Petition

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81-376

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1981

~~IN RE: GRAND JURY PROCEEDINGS (WRIGHT II)~~
HON. ROBERT A. WRIGHT, JUDGE OF THE COURT OF COMMON PLEAS OF THE 32nd JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION

Whether the procedure established below for determining disclosure of federal grand jury material to state court criminal defendants represents an abuse of discretion, as it sets a precedent for undue interference with state criminal proceedings by the federal court system in violation of principles of comity.

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OPINIONS BELOW

The orders of the United States District Court for the Eastern District of Pennsylvania, the Honorable Clarence C. Newcomer, at Nos. 79-680, November 1, 1979 and September 22, 1980, appear in the Appendix and are not officially reported.

The opinions of the United States Court of Appeals for the Third Circuit at Nos. 79-2805 and 80-2585 were filed July 8, 1980 and June 30, 1981 respectively, the former reported at In re: Grand Jury Proceedings, (Wright), 625 F.2d 1106 (3d Cir. 1980); the latter unreported as yet. Both opinions appear in the Appendix.

STATEMENT OF JURISDICTION

The Supreme Court of the United States is authorized to hear the appeal in this case by 28 U.S.C. §1254(1) (1976).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND LAWS

Federal Rule of Criminal Procedure 6(e)

STATEMENT OF THE CASE

The petitioner, the Honorable Robert A. Wright, is a Judge of the Court of Common Pleas of Delaware County, Pennsylvania. Judge Wright is currently presiding over homicide proceedings brought by the Commonwealth of Pennsylvania against George Neagle.

In October of 1979, Mr. Neagle's attorney brought a motion in the United States District Court for the Eastern District of Pennsylvania seeking disclosure of grand jury proceedings for use in Mr. Neagle's defense of the homicide charges; specifically, the motion alleged that the material was sought for use in cross-examining one of the principal Commonwealth witnesses who would be testifying against Mr. Neagle. The same witness had testified before the federal grand jury.

On November 1, 1979, the Honorable

Clarence C. Newcomer, Judge of the United States District Court for the Eastern District of Pennsylvania, entered an Order (Appendix "A") which established a procedure for determining what, if any, Brady* material would be made available to the state defendant on trial for homicide before Petitioner, Judge Wright.

The procedure required Judge Wright to make recommendations through the United States Attorney with respect to the federal grand jury material to the Federal District Court Judge, who would then finally decide the matter of disclosure pursuant to the Federal Rule of Criminal Procedure 6(e). The November 1 Order also prohibited Judge Wright from divulging any of the material which was shown to him pursuant to the Order.

Petitioner appealed the November 1 Order to the United States Court of Appeals

*Brady v. Maryland, 373 U.S. 83 (1963)

for the Third Circuit because he believed that the procedure could place him in an ethical and moral dilemma if the federal grand jury judge did not grant that disclosure to the state defendant recommended by the state trial judge.

In the event this situation arose, the state trial judge would be forced to try a defendant whom he believed was not getting a fair trial, or alternatively, and these alternatives were suggested by the district court, the state trial judge could rely on the defendant to appeal the disclosure ruling, the judge himself could appeal [this alternative was later ruled out by the Third Circuit in the opinion of In re: Grand Jury Proceedings (Wright II),____ F.2d ____ (1981), No. 8-2585 Slip Op. (3d Cir., June 30, 1981) (Appendix "D")], or the state judge could dismiss, sua sponte, the prosecution at great

cost to the state.

The Third Circuit Court of Appeals initially found Judge Wright not to have standing to appeal the Order of Judge Newcomer, as it was the view of the two of the three panel members that the Order was not binding on the Petitioner in the absence of an express command from the district court and "given the serious intrusion into state criminal proceedings that would result if we were to read the order to compel the appellant to examine evidence and confer with the United States Attorney." In re: Grand Jury Proceedings, 625 F. 2d 1106 (3d Cir., 1980) (Appendix "C").

Thereafter Judge Newcomer, upon consideration of a motion filed by state defendant's counsel for compliance with the November 1 Order, left no doubt as to the mandatory nature of the procedure he established in the Order of September 22, 1980 (Appendix "B").

The Petitioner appealed from the two Orders of the district court which have been affirmed by a panel of this Court in In re: Grand Jury Proceedings (Wright II), ___F.2d___(1981), No. 8-2585 Slip Op. (3d Cir., June 30, 1981) (Appendix "D").

The Third Circuit in the latter opinion in this matter believed that the Petitioner was subject to contempt proceedings for failure to make recommendations to the federal grand jury judge and that Petitioner's position that bifurcation of the disclosure deliberation places him in an impossible jurisprudential position is mere theoretical conjecture.

I. The procedure established below for determining disclosure of federal grand jury material to state defendants in state criminal proceedings constitutes an abuse of discretion as it sets a precedent for undue interference with state court proceedings by the federal court.

Discretionary decisions under F.R. Crim. Proc. 6(e) include the procedure for disclosure of grand jury material. In pertinent part, F.R. Crim. Proc. 6(e)(3)(C) provides: "If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time and under such conditions as the Court may direct." The procedure for disclosure established below, wherein the state judge must review the requested material and make a recommendation on disclosure to the federal court, abuses this discretion by presenting the admittedly potential dilemma of

having the federal court deny the state judge's recommendation, thus risking serious intrusion into the state court proceedings.

This Court, in Dennis v. U.S., 384 U.S. 855, 16 L.Ed.2d 973, 86 S. Ct. 1840 (1966) explicitly rejected the idea that a trial judge should be "burdened" with the duty of inspecting and passing on the utility of sometimes voluminous grand jury material to the defense, a duty which the lower court has imposed upon Judge Wright. The responsibility of examining such material in order to ascertain inconsistencies with trial testimony or otherwise further the accused's defense can, according to Dennis, more properly and effectively be undertaken by an advocate, and the trial judge's function should therefore be limited to deciding whether a case has been made for production and to supervise that process without delving into the subject matter to make specific determiation of utility.

If the trial judge were vested with the authority to make the final determination on disclosure, the task of reviewing the material to ascertain its utility to the defense would perhaps be not unreasonable, Douglas Oil Co. v. Petrol Stops Northwest, 411 U.S. 211, 60 L.Ed.2d 156, 99 S. Ct. 1667 (1979). But in light of the fact that, under the procedure established below, the trial judge must spend the time and energy necessary to review the material and then face a possible denial of his recommendation on disclosure, such a responsibility assumes a much more burdensome character and threatens to interfere substantially with the state court proceedings.

Were the federal court to deny the state court's recommendation on disclosure, the trial judge would be placed in the admitted dilemma of having to preside over (or else dismiss the prosecution) a trial wherein the defendant, in the judge's estimation, would not be

afforded the fairhess he is due. As the usual course of judicial proceedings does not sanction such interference by the federal court system with state court proceedings, the disputed procedure is contrary to the spirit of comity and represents an abuse of discretion by the court below. As this Court stated in Douglas Oil, supra, 60 L.Ed.2d at 171, "We have a duty to guide the exercise of discretion by the district courts and when necessary to overturn discretionary decisions under Rule 6(e)." This issue calls for review by this Court of the lower court's discretionary order to Judge Wright to ensure that state court proceedints in this and all similar future caees are afforded the utmost respect and non-interference by the federal courts.

II. The decision of the court below raises important and difficult questions of federal/state relations insofar as it concerns an issue of general, national

significance which would, if resolved, contribute to the body of federal law.

As the desired result of the lower court's decision is to secure uniformity of the law by establishing a single procedure to be applied whenever state court defendants request disclosure of federal grand jury material, such a procedure should not be one which so clearly possesses the potential for conflict between the state and federal court systems. The individual litigants involved herein will be followed by many more who will be faced with the identical potential for conflict and confusion, if the decision below is left undisturbed. This matter calls for the establishment of a single procedure to be applied uniformly and nationwide, thereby warranting immediate resolution by this Court.

III. The decision below raises an important question of federal law which has not been, but

> should be, settled by this Court in the exercise of its supervisory power and as the promulgator of the rules of practice and procedure for the lower federal courts.

This Court, in Douglas Oil, supra, recognized that a proper procedure for disclosure of grand jury material had not been established in the 9th Circuit Court of Appeals at the time of the trial court's ruling. One purpose of this Court's decision in that case was to "afford such guidance in cases of this kind." 60 L.Ed.2d 171 ft.nt. 18. The facts in the case at bar differ materially from those in Douglas Oil, supra, and as there is no settled procedure for cases involving such facts, i.e, requests for disclosure made to federal courts by state court defendants, the case is one of first impression and requires the guidance of this Court as was afforded the litigants in Douglas Oil, supra.

It is wholly unsettled in the eyes of

the law whether a state court has the power under the Federal Rules to order disclosure of federal grand jury material. Although there are no cases granting such authority to a state court, there are also no cases precluding a state judge from resolving a Rule 6(e) motion. This Court in Douglas Oil, supra, established a procedure whereby a California District Court supervising a grand jury was to make a written evaluation of the need for continued secrecy and a determination that disclosure "might" be appropriate based on the limited evidence before it, and then send the requested materials to the Arizona Distric Court where the civil case was pending. The Arizona court, "armed with its special knowledge of the status of the civil actions," would then make the final decision on disclosure.

This procedure was not applied to the case at bar by the lower court, which construed the Federal Rules to mean that only a federal court had the authority to order the

disclosure of federal grand jury material. However, as it is a well settled principle of law that state courts can exercise concurrent jurisdiction with federal courts in cases arising under the Constitution,, laws and treaties of the United States, DiAntonio v. Pa. State University, 455 F. Supp. 510 (1978), the proper construction of Rule 6(e) still remains an unsettled issue at law.

This Court, in Douglas Oil, supra, took care to restrict its decision to situations such as the one presented by that case, wherein the court having custody of the grand jury transcripts has no firsthand knowledge of the litigation in the collateral court and no practical means of obtaining such knowledge. Further, this Court conceded that there will undoubtedly arise cases in which the court to whom the Rule 6(e) request is directed will be able to, on the basis of limited knowledge, intelligently decide the relative needs for secrecy and disclosure, and

expressed "no view whether, on these facts, a court with such knowledge properly could have ordered release of the requested transcripts." 60 L.Ed.2d 171 ft.nt. 20. As the state court judge in the case at bar could easily provide the federal court with enough knowledge of the pending state proceedings for it to intelligently decide the relative needs for secrecy and disclosure, the facts of this case present the identical situation to which this Court in the aforementioned footnote 20 in Douglas Oil was referring, thereby giving this Court the much desired opportunity to express its views.

PROOF OF SERVICE

I hereby certify that on this 19th day of August 1981, I personally caused to be served by mailing, prepaid and first class, United States Mail, a copy of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, in the above matter, to:

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Attorneys for Petitioner,
The Honorable Robert A. Wright

CONCLUSION

We ask that this Court consider what the appropriate procedure for federal grand jury material disclosure to state court defendants should be to avoid a violation of the doctrine of comity and therefore request that a writ of certiorari issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

Howland W. Abramson

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Attorneys for Petitioner

August 20, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS : MISC. NO. 79-680 —
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:
:

O R D E R

AND NOW, to wit, this 21st day of November, 1979, upon consideration of the Petition for Disclosure of Grand Jury Evidence made on behalf of John Doe pursuant to Rule 6(e), F.R.Crim.P, it is hereby ORDERED as follows:

1. The United States Attorney or any properly designated Assistant United States Attorney shall compile all of the grand jury evidence in his possession pertaining to the requests for Brady material set forth in the Petition. See Brady v. Maryland, 373 U.S. 83 (1963).

2. After the United States Attorney has reviewed the evidence for Brady material, he shall transport all of the evidence pertaining to the requests set forth in the Petition to the chambers of Judge of the Court of Common Pleas of Pennsylvania (hereinafter, the State Judge), and shall meet with the State Judge at the State Judge's earliest convenience.

3. The United States Attorney shall consult with the State Judge about the contents of the evidence, and shall communicate his views to the State Judge as to what evidence may constitute Brady material, so that the State Judge may make a fully informed determination of what material ought to be produced under Brady, given the facts and circumstances of the case before him.

4. The United States Attorney shall forthwith communicate the State Judge's recommendations to this Court so that this Court can decide what evidence ought to be divulged pursuant to Rule 6(e), and thereafter enter an appropriate Order. Although this Court has no knowledge of the proceedings in state court, it will be available at any time to consult directly with the State Judge if the State Judge deems it helpful.

5. Pursuant to Rule 6(e)(3)(C), the Court, with the utmost deference, is constrained to Order the State Judge not to divulge to any person the contents of any evidence shown to him unless and until this Court so authorizes, nor to docket this Order in the Court of Common Pleas unless the Petitioner's application to this Court is already a matter of record in that proceeding.

This Court is required by circumstances to address, in the space of two days, difficult questions of law and policy which are, to the Court's knowledge, issues of first impression. The petitioner's state criminal trial is to commence within six days of the date of this Order, and much remains to be done in the course of those six

days. However, a few brief comments are in order so that the reasons for this Court's exercise of discretion are clear on the record.

The Court's discretion must necessarily be guided by the holding in Douglas Oil Co. v. Petrol Stops N.W., _____U.S. _____, 60 L.Ed.2d 156 (1979). In that case, civil litigants in a federal suit in Arizona applied to a federal district judge presiding over a grand jury in the Central District of California for release of grand jury evidence for use in the civil suit. On review, the Supreme Court held that the judge who presided over the grand jury was required to make written findings as to the need for secrecy, and, thereafter, the civil trial judge was to make an informed decision about whether, and to what extent, disclosure would be warranted under Rule 6(e), given the facts of his case.

The instant petition is made under Rule 6(e)(3)(C)(i), which gives this Court discretionary authority to order disclosure "preliminarily to or in conneciton with a judicial proceeding." The law is clear that state judicial proceedings are encompassed within that provision. See, e.g., In re Petition for Disclosure of Evidence Before October, 1959 Grand Jury, 184 F.Supp. 38 (E.D. Va. 1960).

For the record, the Court specifically finds that continued grand jury secrecy as to the matters sought is vitally important. The Petition seeks information relating to matters which are currently under investigation by the grand jury, and disclosure cannot lightly or hastily be ordered.

Hence, the Court is faced with a dilemma arising from the Douglas Oil holding. It would be a clear abuse of discretion to order disclosure without first obtaining information about the case in which the material is to be used. On the other hand, this Court, unlike the California district court in Douglas Oil, cannot ask the presiding judge in the collateral case to make the final Rule 6(e) determination, because the State Judge is not vested with authority to make the "final decision", Douglas Oil, supra.,

60 L.Ed. 2d at 169, as to whether disclosure is warranted.[1]

The procedure set forth above will enable this Court to make an informed determination both as to the need for secrecy and the appropriateness of disclosure, and to balance those considerations accordingly.

We hasten to point out that the provision of this Order prohibiting the State Judge from divulging any of the material he reviews is obviously not in any sense a reflection on his integrity. Rather, it is hoped that the Order protects him from any potential claim by the petitioner that the State Judge has a duty to disclose any or all of the evidence he reviews.[2]

In the Court's view, the most sensitive issue at hand is the possibility that conflicting duties will be placed upon the state trial judge. It is conceivable that the State Judge will recommend disclosure of certain material evidence which this Court cannot, in good conscience, order disclosed. The State Judge at that point would be faced with obvious ethical and jurisprudential difficulities in deciding how or whether to proceed with the case before him.

In the unhappy event that that situation arises, either the State Judge or this Court could immediately inform the Petitioner of the fact that the State Judge's recommendation was not accepted in toto, so that the Petitioner can seek expedited federal appellate review. Alternatively, the State Judge, as one who is affected and bound by this Order, might have standing to seek federal appellate review on his own. And, as a last resort, if the State Judge is privy to knowledge, which he cannot divulge, which indicates to him that the Petitioner will not receive a fair trial unless

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1. Rule 6(e)(3)(C) empowers the "court" to order disclosure. It is clear that such authority is granted only to federal courts. See Rule 1, and Rule 54(a), F.R.Crim.P.

2. The Court expresses no view as to whether the State Judge is bound by Article VI, cl. 2 of the United States Constitution to uphold the rule of secrecy expressed in Rule 6(e), even though he is not empowered to order disclosure thereunder. Under that provision "the Judges in every State shall be bound [by the laws of the United States]".

disclosure is made, he can dismiss the prosecution sua sponte. The costs of such a step to the interests of the state would be considerable, but one could imagine situations where the costs of grand jury disclosure would be even higher. Under all the circumstances of this case, the Court believes that the procedure set forth herein is reasonably calculated to balance all competing interests.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS	:	MISC. NO. 79-680

ORDER

AND NOW, to wit, this 22nd day of September, 1980, upon consideration of petitioner's motion for compliance with this Court's Order of November 1, 1979, it is hereby Ordered that the motion is GRANTED. Judge Wright is directed to meet and confer with the United States Attorney regarding the existence of any Brady material in the grand jury evidence.

In the November 1, 1980 Order, this Court set out what it considered an orderly procedure for disclosure of grand jury materials sought by a state criminal defendant pursuant to Rule 6(e) F.R.Crim.P. The order requested Judge Wright, the presiding judge in the state criminal proceeding, to meet with the United States Attorney and to recommend what grand jury material ought to be produced under Brady v. Maryland, 373 U.S. 83 (1963). Judge Wright, however, declined to review the material, and appealed the November 1, 1979 Order. The Third Circuit subsequently dismissed Judge Wright's appeal for lack of standing, concluding that "the order in question [did not] require the appellant to inspect the information or to confer with the United States Attorney." In Re Grand Jury Proceedings, No. 79-2805 Slip Op. at 5 (3d Cir. July 8, 1980).

ENTERED: FILED SEP 23 1980

CLERK OF COURT

Following the Third Circuit's Opinion, Judge Wright formally declined to review the grand jury material at issue. Accordingly, in order to insure that petitioner's rights are protected, the Court is compelled to direct Judge Wright to meet and confer with the United States Attorney regarding the existence of any Brady material.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2805

IN RE: Grand Jury Proceedings

Robert A. Wright, Judge of the
Court of Common Pleas of Delaware County,
Pennsylvania, 32nd Judicial District,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Misc. No. 79-0680)

Argued May 23, 1980

Before: SEITZ, *Chief Judge*, and GIBBONS and ROSENN,
Circuit Judges

(Filed July 8, 1980)

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OPINION OF THE COURT

PER CURIAM

Robert A. Wright, a state trial judge, appeals from an order of a federal district judge establishing procedures for disclosure of federal grand jury materials to George Neagle, a defendant in a state criminal trial before the appellant.

I.

During 1979, a federal grand jury in the Eastern District of Pennsylvania was investigating Leonard R. Milano for various criminal activities. After the grand jury investigation had begun, Milano was shot and wounded along with Thomas Manley. Manley died as a result of the wounds, but Milano survived.

Thereafter, George Neagle was charged by the Commonwealth of Pennsylvania with several offenses arising out of the shooting incident involving Milano and Manley. His case was scheduled on the appellant's docket. Because it appeared that Milano would be a witness at Neagle's state trial, Neagle made a motion in federal district court for disclosure of certain information the grand jury had on Milano. The motion was served on the state prosecutor and the United States Attorney. It was not served on appellant.

The district court entered an order directing the United States Attorney to compile all grand jury material pertinent to Neagle's request. The United States Attorney was then directed to transport the information to the

appellant's chambers and to consult with him about what evidence would constitute *Brady* material. *See Brady v. Maryland*, 373 U.S. 83 (1963). The United States Attorney was to get a recommendation from the appellant as to disclosure and then communicate that recommendation to the district court. At that time, the district court would determine whether Fed. R. Crim. P. 6(e) permitted disclosure. The district court reasoned that this procedure was necessary because it was unfamiliar with the facts surrounding the state proceeding.

Although the appellant was not a party in the district court, he has taken this appeal to challenge the procedure employed by the district court. The appellees are the United States Attorney and Neagle. The state prosecutor is not an appellee.

II.

At the outset, although the parties have not considered the issue, we must determine whether the appellant has standing to appeal the procedures set out in the order. To decide this question, an understanding of exactly what the district court's order contemplated vis-a-vis the appellant is necessary.

The crucial portions of the order provide:

> 2. After the United States Attorney has reviewed the evidence . . ., he shall transport all of the evidence pertaining to the requests . . . to the chambers of [the appellant], and shall meet with the State Judge at the State Judge's earliest convenience.
>
> 3. The United States Attorney shall consult with the State Judge about the contents of the evidence and shall communicate his views to the State Judge as to what evidence may constitute *Brady* material, so that the State Judge may make a fully informed determination of what material ought to

be produced under *Brady*, given the facts and circumstances of the case before him.

4. . . . Although this Court has no knowledge of the proceedings in state court, it will be available at any time to consult directly with the State Judge if the State Judge deems it helpful.

5. Pursuant to [Fed. R. Crim. P.] 6(e)(3)(C), the Court, with the utmost deference, is constrained to Order the State Judge not to divulge to any person the contents of any evidence shown to him unless and until this Court so authorizes, nor to docket this Order in the Court of Common Pleas unless [Neagle's] application to this Court is already a matter of record in that proceeding.

In another context, the United States Attorney and Neagle argue that the order is not binding on the appellant until he decides to participate in the procedure specified in the order. In effect, this reading of the order, which the appellant conceded at oral argument was a reasonable one, means that unless the appellant actually reviews the material and confers with the United States Attorney, he is not bound by the order. We agree for several reasons.

First, by its terms the order is directed to the United States Attorney, not the appellant. Nowhere does the order expressly command the appellant to take any positive action with respect to the information. The paragraph dealing with secrecy seems to contemplate that appellant may not divulge any grand jury information only if he chooses to confer with the United States Attorney. Second, we have read the opinion of the district court that accompanied the order, and we find no hint that the appellant would be held in contempt for deciding not to examine the information or confer with the United States Attorney.

Finally, given the serious intrusion into state criminal proceedings that would result if we read the order to

compel the appellant to examine the evidence and confer with the United States Attorney, we are reluctant to conclude that the district court intended to bind a state judge in such a manner without some clear, manifest indication that this was the import of the order. As the quoted language demonstrates, such is not the case here. Thus while the issue is not entirely free from doubt, we conclude that the order in question does not require the appellant to inspect the information or to confer with the United States Attorney.

Seen in this light, the form of the order resolves the standing issue.[1] Whatever else may be required, one fundamental prerequisite of standing for purposes of article III is that there be "actual or threatened injury as a result of the putatively illegal action [in question]." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The reason the test includes "threatened injury" is that a person should not have to wait for actual injury to satisfy the dictates of article III. If there is a sufficiently imminent threat of harm, that is enough to satisfy the case or controversy requirement.

The reverse of this proposition is that if there is no real probability the alleged injury will ever occur, the concreteness that article III demands is absent. Obviously, in all such cases the probability of the injury's occurrence is a matter of degree, which means that most cases stand on their facts and general principles are hard to derive. Here, whether the injury will ever occur depends solely on the appellant's decision whether to confer with the United States Attorney. The order imposes an obligation on him only if he decides to confer. Moreover, there is no indication in the record one way or the

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1. Both Neagle and the United States Attorney consider the form of the order as having relevance to whether the district court had power to do what it did. Neither, however, discussed the relevance of the form of the order to standing, which we believe is its primary significance in this appeal.

other about what action the appellant intends to take in this regard. The very fact that he does not want to involve himself, as is shown by this appeal, would seem to indicate that when the time comes, he will in fact not involve himself.

Thus the appellant can easily avoid any injury by deciding not to confer. Such conduct is not barred by the order and carries no danger of contempt. We note that this is true especially because of the nature of the injury to appellant. The only possible injury of which the appellant complains is his involvement in the procedure in question. Because the appellant can avoid those procedures without any harm, there is no imminent threat of injury to any interest of the appellant.

We realize that by holding that appellant has no standing due to the form of the order, we have reached the merits of the appeal to the extent of construing the order. As we have noted before, however, resolution of standing often involves the merits in one way or the other. *See Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973) ("The substantive issues must be considered to ascertain whether 'there is a logical nexus between the status asseted and the claim sought to be adjudicated.' " (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

Nevertheless, the question of what procedure the order in fact required and the question of whether those procedures are legally permissible are analytically distinct. Because our ruling rests solely on the fact that the order does not injure the appellant, we express no view on the propriety of the procedures employed. Moreover, this does not leave Neagle without review. If the appellant decides not to confer, we assume the district court will reconsider Neagle's motion and enter an appropriate order.

Accordingly, we conclude that because appellant need not examine any of the information nor confer with

the United States Attorney, he is in no danger of injury and thus has no standing.

III.

The appeal will be dismissed.
Each party to bear its own costs.

GIBBONS, *Circuit Judge*, dissenting.

I dissent from the judgment dismissing this appeal. I would reach the merits, and affirm.

George Neagle is charged by the Commonwealth of Pennsylvania with murder and other serious offenses. In that prosecution the Commonwealth is bound, by virtue of the sixth amendment, to afford Neagle compulsory process for the production of evidence relevant to his defense. *Washington v. Texas*, 388 U.S. 14 (1967). The Commonwealth's principal witness in the prosecution is expected to be Leonard R. Milano, Jr., who is the subject of an ongoing federal grand jury investigation in the Eastern District of Pennsylvania, being conducted by the United States Attorney in that district. Neagle requested the state court to issue an order compelling production of materials that may be exculpatory, including those materials relating to Milano, in the possession of the United States Attorney as a result of the grand jury investigation. Obviously, since the United States Attorney is located in the territory of the Commonwealth of Pennsylvania, he could have been served with the compulsory process of the Pennsylvania courts. Had Judge Wright elected to proceed in that manner, the United States Attorney, looking at Fed. R. Crim. P. 6(e), would have seen that disclosure by him of matters occurring before a federal grand jury could be made "when so directed by the court preliminary to or in connection with a judicial proceeding." His further inquiry would have

disclosed that the judicial proceedings for which disclosure may be made on court order include judicial proceedings in state courts. *E.g., Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973); *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958); *United States v. Goldman*, 439 F. Supp. 337 (S.D.N.Y.1977); *United States v. Salanitro*, 437 F. Supp. 240 (D. Neb. 1977). At that point the United States Attorney would have been faced with the question which the district court considered, and which the majority avoids; namely, what court shall make the determination of particularized need for disclosure of the federal grand jury materials in the state court proceeding. He might well have concluded that Rule 6(e) authorizes a state court judge to make that determination, since by virtue of the supremacy clause of the Constitution that judge would be obliged to apply the same federal law standards of disclosure as would a district court judge. No case construing Rule 6(e) definitively precludes that result, although in the cases establishing that the judicial proceeding exception to federal grand jury secrecy includes state judicial proceedings, the disclosure decision was made by a federal court. *See, e.g., Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894; *Doe v. Rosenberry*, 255 F.2d 118; *United States v. Goldman*, 439 F. Supp. 337; *United States v. Salanitro*, 437 F. Supp. 240. In the likely event that the United States Attorney was uncertain about where the disclosure decision should be made, he would have had the option of resisting the state court process, inviting an enforcement proceeding, and removing that proceeding to a federal district court pursuant to 28 U.S.C. §1442 (1976). That course would have tendered to the district court the very issue which in this case it decided; which tribunal should make the disclosure determination.

I have outlined the scenerio which would have resulted from a decision by Judge Wright to issue state

court process because I believe that the majority decision now makes it inevitable. By construing the district court order as if it had no impact on the state court judge, this court has deprived him of a definitive ruling on the question of who should make the disclosure ruling. At the same time he must recognize that because of the holding in *Washington v. Texas*, 388 U.S. 14, he cannot simply ignore grand jury materials possibly relevant to the defense. Since he has indicated by this appeal his dissatisfaction with the method devised by the district court for screening those materials, and has been told by the majority that he is not bound by the district court order, the next step is plain. Neagle will renew his request for compulsory process and Judge Wright will issue it. The United States Attorney, however, this time will have no option to consider whether Rule 6(e) contemplates that a state court may make the disclosure determination. He is bound by the district court order even though the state court judge is not. Thus he will almost certainly file a removal petition, and the underlying question will reappear first in the district court, then here on appeal. The passage of time will have contributed nothing to its resolution. The inevitable delay of the state court murder trial will, however, have contributed to disharmonious relations between two court systems, both of which are bound by the compulsory process clause of the sixth amendment.

The majority holds that Judge Wright lacks standing to appeal. I disagree. The general rule is that an appellant must be privy to the record and aggrieved by the order from which he appeals. 9 Moore's Federal Practice ¶203.06 (2d ed. 1980); 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3902 (1976). However, the privy to the record requirement is not absolute. Nonparties have been allowed to appeal orders denying intervention, *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S.

921 (1976), orders denying claims of privilege, *Overby v. United States Fidelity and Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955), orders directed to them, *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972), and orders which, though not directed to them, substantially affect their interests. *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Dietrich Corp. v. King Resources Co.*, 590 F.2d 422 (10th Cir. 1979).

Had Judge Wright been unconditionally ordered to perform, or not to perform, an act, he would clearly have possessed standing to appeal. *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352. I do not understand the majority to suggest otherwise. Its holding that Judge Wright's appeal fails to satisfy the case or controversy requirement depends entirely upon the form of order, which, as construed by the majority, is conditional. I strongly suspect that the majority's construction of that order will be a surprise to the judge who drew it. But be that as it may, even construing the order as permitting Judge Wright an option to comply, in truth he has no option at all. He is bound by the holdings in *Washington v. Texas*, 388 U.S. 14, and *Brady v. Maryland*, 374 U.S. 83 (1963). He must take steps to obtain the grand jury materials either by complying with the order or by issuing his own process against the United States Attorney. The suggestion that he is so unaffected by the order that his objections cannot satisfy Article III case or controversy requirements is unsound. And if any prudential standing considerations are at work, they escape my attention. Prudence dictates that the issue presented by this appeal be resolved now, not in the next round of litigation.

A far more sensible approach to standing to appeal was taken by the court in *Glen W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975). There the trial court restrained prosecution by class members of inde-

pendent state and federal actions pending disposition of a federal class action. The Kentucky Attorney General appealed the restraining order. This court noted that the restraint against prosecution was not absolute, since "a party need only exclude himself from the class actions to be free of the restraint." 521 F.2d at 778. We held, nevertheless, that "[s]ince the Attorney General cannot exclude Kentucky citizens from the federal class action, the January 15 order effectively prohibits him from executing upon his state court judgment" and, therefore, he could appeal. 521 F.2d at 779. Judge Wright's future course of action is determined as effectively by the order appealed from here as was the future course of action of the Kentucky Attorney General in *Glen W. Turner*.

Recognizing that compulsory process for federal grand jury materials presented delicate issues of federal-state relations, and that a state enforcement proceeding would probably be removed, Judge Wright attempted to have those issues resolved promptly in a federal forum. The majority's unwillingness to decide them is a grave disservice to a cooperative state court judge, and to harmonious federal-state relations.

On the merits, I would affirm the district court's order. In essence it requires that the disclosure decision be made in a federal forum. I am not ready to hold that Rule 6(e) requires that ruling in every instance in which federal grand jury materials are sought for state court proceedings. But where disclosure has been ordered for such proceedings in the past, a federal court has made the Rule 6(e)(3)(C)(i) determination. It is a less convenient method for state court judges trying criminal cases than allowing them to make disclosure decisions as the trial progresses. However, requiring it here was not, in my view, an abuse of the district court's discretion. *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. at 223; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The defendant Neagle will get

what *Washington v. Texas* and *Brady v. Maryland* require, countervailing Rule 6(e) policies will be given due consideration, and the impact on the state trial will not be overwhelming.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.) -29-55

Abramson

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2585

IN RE: GRAND JURY PROCEEDINGS (WRIGHT II)
Honorable Robert A. Wright, Judge of the Court of Common Pleas of the Thirty-Second Judicial District of the Commonwealth of Pennsylvania.
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Misc. No. 79-00680

Argued: March 26, 1981

Before: ADAMS and GARTH, *Circuit Judges*, and
FISHER, *District Judge**

(Filed June 30, 1981)

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* Honorable Clarkson S. Fisher, Chief Judge of the United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This controversy, which is before us for the second time, centers on the district court's innovative procedure for deciding whether confidential federal grand jury materials should be disclosed to a state criminal defendant. Finding that the district judge had the power to implement the contested procedure, and that his decision to adopt it did not constitute an abuse of discretion, we affirm.

I.

The Honorable Robert A. Wright, a judge of the Pennsylvania Court of Common Pleas, currently presides over criminal proceedings against George Neagle. The Commonwealth of Pennsylvania has charged Neagle with, *inter alia*, assaulting and shooting Leonard Milano and Thomas Manley in May 1979. Manley died from injuries incurred during the incident; although wounded, Milano survived. It is expected that Milano will be a principal prosecution witness against Neagle in the state criminal trial.

At the time of the shooting, a federal grand jury in the Eastern District of Pennsylvania was investigating Milano's alleged criminal activities. As part of his discovery in connection with the state criminal trial, Neagle

filed a motion in federal district court for disclosure of any grand jury materials relating to Milano that might prove exculpatory. He served the motion on the state prosecutor and the United States Attorney, but not on Judge Wright. On November 1, 1979, the district court entered an order directing the United States Attorney to assemble grand jury material relevant to Neagle's request. The court further directed the United States Attorney to transport the material to Judge Wright's chambers, and to consult with him about what evidence would constitute material disclosable under *Brady v. Maryland*, 373 U.S. 83 (1963). After obtaining a recommendation from Judge Wright, the United States Attorney was to communicate that recommendation to the district court, which would then determine whether Rule 6(e) of the Federal Rules of Criminal Procedure permitted disclosure.

Judge Wright objected to the district judge's proposals, and appealed from the district court order. In an opinion filed July 8, 1980, we dismissed the appeal on the ground that Judge Wright lacked standing to challenge the district court's order. *In re Grand Jury Proceedings (Wright)*, 625 F.2d 1106 (3d Cir. 1980). Because the order was directed to the United States Attorney rather than to Judge Wright, we declined to interpret it as binding on the state court judge. Following our disposition of the appeal, Neagle made a motion for compliance with the district court's order. Judge Wright filed a reply. On September 23, 1980, the district court issued a new order, this time addressed to Judge Wright as well as to the federal prosecutor, which stated in relevant part: "Judge Wright is directed to meet and confer with the United States Attorney regarding the existence of any *Brady* material in the grand jury evidence." Judge Wright again appeals.

II.

Before considering the merits of the appeal, we confront three preliminary issues: whether the district court's order of September 23, 1980 is appealable; if it is, whether Judge Wright has standing to pursue the appeal; and if he has, whether the district court had personal jurisdiction over Judge Wright to bind him by its order.

Ordinarily, a district court's order is a "final decision" appealable under 28 U.S.C. §1291 only if it disposes of all claims between the parties.[1] The controverted order in the case at hand does not resolve the central issue before the district court — Neagle's motion for disclosure. Nonetheless, all parties to this appeal agree that the order is "final" within the meaning of §1291, under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). That is, the parties claim that the September 23 order falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978).

Application of the collateral order doctrine is appropriate. The district court's order conclusively determines the responsibilities of the state court judge in the federal disclosure proceeding. Moreover, the question of how responsibility for reviewing grand jury materials should be allocated between state and federal courts is distinct from the merits of Neagle's motion for disclosure. Finally, if Judge Wright complies with the order, he would

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1. *See, e.g.*, Tilden Fin. Corp. v. Palo Tire Serv., Inc., 596 F.2d 604, 606 (3d Cir. 1979); Richerson v. Jones, 551 F.2d 918, 922 (3d Cir. 1977).

seem to be barred from obtaining review of the propriety of the order, since it is doubtful that he could appeal from the eventual adjudication on the merits of Neagle's petition. Unless Judge Wright fails to comply with the November 23 order and is held in contempt, he will have no opportunity to challenge the procedure set up by the district court. In view of the official status of the appellant, noncompliance and contempt should not be required. *See United States v. Nixon*, 418 U.S. 683, 691-92 (1974).

The issue of standing, which proved nettlesome the first time this case came before us, presents no impediment to adjudication of the current appeal. The district court directed its original order exclusively to the United States Attorney. For this reason, we held that the first order imposed on Judge Wright no obligation whatsoever, and that a refusal on his part to meet with the United States Attorney would not prompt federal court sanctions. Because there was no impact on Judge Wright, he lacked standing to challenge the order. By contrast, the revised order of September 23, 1980, is directed to Judge Wright as well as to the United States Attorney. Should the state judge decline to comply with the second order, he would risk incurring the sanctions of the district court. Thus there is, in the present posture of the case, an "actual or threatened injury as a result of the putatively illegal" action. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The threat of harm is sufficiently imminent to confer on Judge Wright standing to pursue the instant appeal.[2]

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2. Moreover, Judge Wright may be understood to complain of actual, as well as threatened, "injury." He asserts, for example, that the district court's order violates principles of federal-state "comity" embedded in the Constitution. Even absent the possibility of contempt, this assertion might be understood as a claim of present constitutional injury. Although we disagree with the merits of this argument, *see* Part II B *infra*, the assertion of present harm might suffice to confer standing. *See* Duke Power Co. v. Carolina Env't

Personal jurisdiction is the final threshold issue. Judge Wright maintains that the district court lacked in personam jurisdiction over him because Neagle never served him with process and he did not appear before the district court to participate in its proceedings. We conclude, however, that the record is adequate to establish in personam jurisdiction.

As a general matter, personal jurisdiction may be acquired by a litigant's appearance or participation in the lawsuit. *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943). Moreover, objections to personal jurisdiction are waived if not timely asserted by motion or in the answer. *Pila v. G. R. Leasing & Rent Corp.*, 551 F.2d 941, 942-43 (1st Cir. 1977); *United States v. Article of Drug*, 362 F.2d 923, 926-27 (3d Cir. 1966). *See also Zelson v. Thomforde*, 412 F.2d 56, 59 (3d Cir. 1969) ("because personal jurisdiction may be conferred by consent of the parties, expressly or by failure to object . . . a court may not sua sponte dismiss for want of personal jurisdiction, at least where a defendant has entered an appearance by filing a motion . . . or otherwise"). In this case, Judge Wright filed a reply to Neagle's motion for compliance. In the reply, he declined to raise an objection to personal jurisdiction. We believe that Judge Wright thus became a party to the federal proceedings and waived any claim that the district court lacked in personam jurisdiction.

III.

On the merits, Judge Wright can be understood to assert two related objections: that the district court lacked the power to direct him to confer with the United States Attorney, and that exercise of this power, if it ex-

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NOTE 2 — *(Continued)*

Study Group, 438 U.S. 59, 72 (1978) (standing requirement satisfied when plaintiff has suffered "distinct and palpable injury" traceable to challenged conduct); Warth v. Seldin, 422 U.S. 490, 501 (1975) (same).

isted, amounted to an abuse of discretion. The power question might seem logically antecedent to the abuse of discretion issue. The court's authority to enter the order, however, depends on whether the order was reasonably calculated to achieve the ends of justice. This question is inseparable from our inquiry into the court's discretion. For this reason, we initially will inquire into whether, assuming he had authority, the district judge abused his discretion in issuing the contested order.

A.

In the typical case involving a motion for disclosure of grand jury materials, the court to whom the disclosure request is addressed is also the supervising authority over the grand jury. In such a situation, there is no doubt that the tribunal is well-situated to ascertain whether the prerequisites to disclosure under Rule 6(e)(3)(C) have been met,[3] that is, whether the material sought "is needed to avoid a possible injustice in another judicial proceeding, . . . the need for disclosure is greater than the need for continued secrecy, and [the] request is structured to cover only material so needed." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). *See also Dennis v. United States*, 384 U.S. 855, 869-72 (1966); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (applicant must show that without disclosure a defense would be greatly prejudiced or an injustice done).

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3. Rule 6(e)(3)(C) provides in pertinent part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may . . . be made —
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Complications arise when, as here, grand jury material is sought by a defendant preparing for trial before a court different from the one that supervised the grand jury. In this situation, the court in charge of the grand jury is the most suitable to determine the need for continued secrecy, while the court in which criminal charges are pending may be the most competent to evaluate the defendant's need for the requested materials. The district judge in the present case elected a cooperative arrangement, designed to accommodate these different areas of competence, in which he reserved for himself the final decision on the Rule 6(e) motion, but directed the state judge to assess the defendant's need for disclosure. Because the district courts have discretion under Rule 6(e) to fashion the proper response to requests for disclosure, *see Douglas Oil Co. v. Pacific Stops Northwest*, 441 U.S. at 228; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959), the question before us is whether the district court abused its discretion in prescribing this allocation of responsibility.

To evaluate the propriety of the district court's action, it will be helpful to enumerate the various methods through which Neagle's request might have been presented and decided. Analytically, at least three possibilities suggest themselves: the motion might have been made to the state court and resolved there without consultation with the federal court; the motion might have been presented to the federal court and adjudicated there without consultation with the state court; or responsibility for deciding the motion, wherever brought, could have been shared between the interested tribunals.

The first possibility need not detain us, inasmuch as Neagle presented his motion to the federal, rather than the state, court. There is, moreover, some doubt whether the Rule 6(e) motion could have been brought initially to

the state court, let alone decided there; for the Supreme Court has stated that "in general, requests for disclosure of grand jury transcripts should be directed to the court that supervised the grand jury's activities."[4]

Judge Wright endorses the second theoretical procedure: having been filed in federal court, the Rule 6(e) motion should have been decided there, with the federal court evaluating both the need for continued secrecy and Neagle's interest in disclosure. The Supreme Court, however, foreclosed this approach in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). In that case, civil antitrust litigation in the District of Arizona proceeded contemporaneously with a grand jury investigation of the defendants in the Central District of California. The civil plaintiffs moved the California district court for disclosure of the grand jury proceedings, and that court, without seeking the assistance of the Arizona tribunal, ordered release of portions of the grand jury transcript, on the ground that a "particularized need" for disclosure existed. The Supreme Court, however, held the disclosure an abuse of discretion. The Court noted that the California district judge "readily conceded that he had no knowledge of the civil proceedings pending several hundred miles away in Arizona:"

> Appreciating that it was largely ignorant of the Arizona civil suits, the [California] court nonetheless made a judgment concerning the relative needs for secrecy and disclosure. . . . A court more familiar with the course of the antitrust litigation might have seen important [indications] that disclosure would likely be of little value to respondents, save perhaps as a mechanism for general discovery. Alternatively, the court where the civil proceedings were pending might have considered disclosure at that point in the litigation to be premature.

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4. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 222, 226 (1979).

Id. at 229-30. The Supreme Court held that the deficiencies in the California court's knowledge of the Arizona actions rendered its ruling on disclosure an abuse of discretion.

Analogously, the district judge in the case at bar has not monitored the criminal proceedings against Neagle in the state court, and is in no better position to balance the need for secrecy against the value of disclosure than was the California district judge in *Douglas Oil*. There is, moreover, an even greater need for the district court here to be aware of the defendant's situation, since the controversy is criminal in nature. *See Dennis v. United States*, 384 U.S. 855, 870-71 (1966). Given *Douglas Oil*, it appears that the district court would abuse its discretion if, following Judge Wright's suggestion, it unilaterally ruled on the disclosure motion, without consulting the state court.

In light of the inadequacies inherent in leaving the disclosure decision entirely in the hands of either the state or federal court, the district judge in this case was compelled to adopt some version of the third possible approach to disclosure: to seek some accommodation between the court in a position to evaluate the need for secrecy and the court competent to assess the defendant's interests. *Douglas Oil* itself suggests one form for such an accommodation. The Supreme Court directed the California district court to make "a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it showed that disclosure might be appropriate." 441 U.S. at 230. The California court would send its evaluation to the Arizona federal court, and would delegate to the latter court the responsibility for deciding the motion. The Arizona court would then be fully competent to resolve the issue, since it would be "armed with its special knowledge of the status of the civil actions," *id.*, as well as with the California court's evaluation.

Transposed to the present case, the *Douglas Oil* approach would direct the district court to appraise the need for grand jury secrecy and to convey this recommendation to the state court. Judge Wright then would decide the disclosure motion based on his special knowledge of the criminal proceedings against Neagle as well as on the district court's evaluation.

Sound arguments, however, counsel against importing the *Douglas Oil* procedure in this matter. It is not at all clear, for instance, that a state court has the power, under the Federal Rules, to order disclosure of federal grand jury materials. No case brought to our attention holds that state courts possess the requisite authority;[5] indeed, before *Douglas Oil* several courts had indicated that disclosure powers were confined not merely to the federal courts, but to the federal court that convened the grand jury.[6] Construction of the Federal Rules casts futher doubt on the capacity of state courts to decide Rule 6(e) motions. Although Rule 6(e)(3)(C)(i) does not, by its terms, specify which court, state or federal, should make the ruling on disclosure, terms in the Federal Rules generally are given a federal reference. *See* Fed. R. Crim. P. 54(c). The Rules, moreover, apply only to federal courts. *See* Fed. R. Crim. P. 1, 54(a). It is reasonable to infer, therefore, that Congress intended a federal court to make the Rule 6(e) determination.

However, we need not decide the limits of a state court's power to direct release of materials in the custody of a federal grand jury. Rather, we note the uncertainties surrounding the existence of such power as indicating that the district court in the case at bar did not act unrea-

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5. *But cf.* In re Grand Jury Proceedings (Wright), 625 F.2d 1106, 1110 (3d Cir. 1980) (Gibbons, J., dissenting) (no case precludes state judge from resolving Rule 6(e) motion).

6. *See* Illinois v. Sarbaugh, 552 F.2d 768, 772-73 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); Gibson v. United States, 403 F.2d 166, 167 (D.C. Cir. 1968).

sonably in declining to delegate to the state court the responsibility for ruling on the disclosure motion. We cannot say that the court abused its discretion when it did not adopt the closest analogue to the *Douglas Oil* procedure.[7]

Notwithstanding the reservations about application of the *Douglas Oil* model, it remains to be seen whether the procedure which the district court adopted — consultation with the state court but retention by the district judge of final responsibility for the disclosure decision — is an acceptable alternative. We conclude that it is. By requiring the state court's recommendations with respect to the defendant's need, the procedure vindicates the policies underlying *Douglas Oil:* each tribunal will evaluate that aspect of the disclosure determination which it is most competent to consider, and the ruling court will have the benefit of the other court's suggestions. The procedure thus avoids the uninformed, unilateral decisionmaking that *Douglas Oil* precludes, while maintaining the federal decisionmaking role that the Rules arguably mandate. We also note that the district judge has built into his order a fair measure of flexibility. The court has stated that "it will be available at any time to consult directly with the State Judge if the State Judge deems it helpful." We interpret this statement to embrace the possibility that the district court, after making its initial ruling, will entertain subsequent recommendations offered by the state judge, should the latter's

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7. The Supreme Court in *Douglas Oil* acknowledged that the procedure adopted there might not be appropriate in every case where expertise in evaluating the Rule 6(e) prerequisites is distributed between two courts. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 231 ("We do not suggest, of course, that [the approved] procedure would be required in every case arising under Rule 6(e). Circumstances that dictate the need for cooperative action between the courts of different districts will vary.") Absent rule making by Congress, we think that the district courts retain discretion to assess the need for, and extent of, "cooperative action."

knowledge of the grand jury materials convince him that further disclosure is called for at a later date.[8]

The procedure which the district court adopted is not without precedent. In *Gibson v. United States*, 403 F.2d 166 (D.C. Cir. 1968), a federal grand jury had returned a no true bill against the defendant. Thereafter the United States Attorney initiated prosecutions by information in the District of Columbia Court of General Sessions. The defendant then filed a motion in the district court for pretrial production of testimony given to the federal grand jury. The district court, adopting a procedure similar to that in issue here, refused to grant access to the grand jury testimony in the absence of a preliminary finding by the Court of General Sessions that disclosure of the testimony was warranted.

On appeal, the District of Columbia Circuit approved the district court's approach, stating:

> [T]he government argues that the District Court established a sound administrative procedure for cases of this sort by refusing to grant access to the grand jury testimony without a request or certification by the Court of General Sessions that production would be warranted. The procedure suggested

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8. In his brief, Judge Wright conjectures that compliance with the district judge's order may ultimately present him with a dilemma. If the state judge recommends disclosure of materials which the federal judge later decides not to release, the state judge may find that he possesses knowledge of materials he believes should be released to a defendant in his court, yet he will be powerless to grant disclosure. While we recognize this problem as a theoretical possibility, we believe that the provision for continued consultation between the federal and state judges will minimize the risk of its occurrence. Moreover, the potential dilemma can be completely avoided only by vesting responsibility for the Rule 6(e) determination in the state court, or by directing the federal court to make the determination without consulting the state court. But Judge Wright does not endorse either alternative, and for reasons given above, serious objection can be made to both suggestions.

> by the Government is attractive. If the defendant prosecuted in the Court of General Sessions first requested that court to make such a certification, the District Court could rely upon a finding by the court where the case was pending; it would not face the need itself to examine the circumstances of a case in which it was not otherwise involved.

Id. at 167. The procedure employed by the district court in the present case differs only slightly from that involved in *Gibson*. It requires Judge Wright to inspect the requested grand jury materials and to advise the district court as to their relevancy to the state criminal proceedings, but does not require him to make a request or certification. To be sure, Gibson is not entirely persuasive as authority: the decision rested to some extent on the premise that only the court that convened the grand jury could order disclosure of its materials, *see id.*, a premise which *Douglas Oil* overruled.[9] Nonetheless, *Gibson*, while not controlling, reinforces the conclusion that the district judge in the case at hand did not abuse his discretion in resorting to the disputed procedure.

We conclude that the district judge's order is reasonably calculated to accommodate the competing values of grand jury secrecy and disclosure to interested defendants. We further conclude that the procedure is consistent with the guidelines that the Supreme Court established in *Douglas Oil*. That being the case, we find that the court's order does not embody an abuse of discretion.

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9. *Gibson* is also distinguishable because of the unique symbiotic relationship that existed between the federal and local courts of the District of Columbia at the time of the decision. For instance, the United States Court of Appeals was then the final appellate tribunal for decisions rendered by the local courts. Thus the District of Columbia Circuit enjoyed a measure of supervisory power over the local courts which is not generally available to federal courts with respect to state courts.

B.

A finding that the district court designed a reasonable method for resolving the Rule 6(e) issue does not end our inquiry. Notwithstanding the advantages of the procedure, we may sustain the court's order only if that tribunal had the power to charge Judge Wright to confer with the United States Attorney. The appellant contends that the district judge lacked the requisite authority. The argument in this regard essentially is two-fold: it is asserted first, that the district courts lack power to bind any third party to assist in the determination of Rule 6(e) questions, and second, even assuming district courts might exercise this power in some circumstances, that they are precluded from binding state court judges.

The starting point of our inquiry into district court power is the All Writs Act, 28 U.S.C. §1651(a). The Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Act, whose earliest antecedents are Sections 13 and 14 of the Judiciary Act of 1789,[10] does not vest plenary power in the federal courts. Rather, it provides them with the procedural tools necessary to exercise their limited jurisdiction.[11] The language of the Act suggests

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10. Section 13 concerned writs of mandamus and prohibition, *see* 1 Stat. 80 (1789), while Section 14 conferred power to grant writs of scire facias, habeas corpus, "and all other writs not specifically provided for by statute, which may be necessary for the exercise of [federal court] jurisdiction, and agreeable to the principles and usages of law," 1 Stat. 81 (1789).

11. *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1289 (9th Cir. 1979); United States v. RMI Co., 599 F.2d 1183, 1185 (2d Cir. 1979); Ford v. Carballo, 577 F.2d 404, 407 (7th Cir. 1978).

two fundamental limitations on its scope: the purpose of an order issued pursuant to the Act must be to aid the court in the exercise of its jurisdiction, and the means selected must be comparable to a common law writ.[12]

We have no doubt that the first of these prerequisites is satisfied in the case at hand. The district court, as custodian of the grand jury materials, had jurisdiction to entertain a motion for disclosure made under Rule 6(e). The court designed its order to aid the exercise of this jurisdiction by structuring opportunities for the type of consultation with the state court that *Douglas Oil* seems to require. In light of the Supreme Court's guidelines concerning Rule 6(e), a disposition similar to that prescribed by the district court would seem, in the terms of the All Writs Act, "necessary or appropriate" to the exercise of federal jurisdiction.

It is not incumbent upon us, however, to decide whether the specific order at issue here is "necessary," in some rigorous sense of that term. In *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942), decided under the predecessor to Section 1651, the Supreme Court held that an inferior tribunal "is not limited to issuing a writ [under the All Writs Act] only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its . . . duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." The district court in the present case determined that the consultation procedure he resorted to would aid him in the performance of his duties under the Federal Rules of Criminal Procedure.

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12. *See* United States v. New York Tel. Co., 434 U.S. 159, 187 (1977) (Stevens, J., dissenting); Price v. Johnston, 334 U.S. 266, 279-82 (1948); United States v. RMI Co., 599 F.2d 1183, 1185 (3d Cir. 1979).

and thereby would help "achieve the ends of justice." After *Douglas Oil*, we cannot say that this judgment was flawed. Thus the first prong of the Section 1651 standard is satisfied.

In addition to assisting the exercise of federal jurisdiction, an order made pursuant to the All Writs Act must be "agreeable to the usages and principles of law." In this context as well, Section 1651 tolerates a flexible approach. In *Price v. Johnston*, 334 U.S. 266 (1948), where the Supreme Court recognized the power of a court of appeals to command that a state prisoner be brought before it to argue his own appeal, the Court declared that federal tribunals, acting pursuant to the All Writs Act, are not limited to remedies available at common law when the original Judiciary Act was adopted in 1789. The Act is not "an ossification of the practice and procedure of more than a century and a half ago," *id.* at 282, but "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. at 273). Thus when justice requires "the use of a variation or a modification of an established writ," federal courts will not be constrained by the ordinary forms and purposes of legal process. 334 U.S. at 283-84.

The Supreme Court supplied further instruction on the requirement that writs be "agreeable to the usages and principles of law" in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). The Court there held that a district judge had the power to order a third party telephone utility to assist with the installation and use of pen registers.[13] Along with deciding that the company's

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13. A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications, nor does it indicate whether calls are actually completed. *See* United States v. New York Tel. Co., 434 U.S. at 161 n.1.

assistance was essential to implement surveillance the district court had ordered under Federal Rule of Criminal Procedure 41, the Court considered the form of the order, which, New York Telephone argued, exceeded traditional bounds by directing the conduct of a third party. The Court isolated several factors relevant to its approval of the district judge's order. Although the order purported to bind a company that had engaged in no wrongdoing and was not a party to the original action, federal court power under Section 1651 extends to all persons who "are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 174. The courts do not possess unlimited authority to impose duties upon third parties, but their action will generally be upheld if the burden imposed is not "unreasonable." *Id.* at 172. Relevant to an inquiry concerning reasonableness are the connection of the third party to the original controversy and the burdensomeness of the court's directive. *Id.* at 174-75.

Judged by the standards of *Price v. Johnston* and *New York Telephone Co.*,[14] the district court order at issue here would seem "agreeable to the usages and principles of law." Although Judge Wright is not a party to the dispute over disclosure of the grand jury materials, his assistance could prove valuable to a proper resolution of that controversy, since he is in a better position than the district judge to evaluate Neagle's need for access to confidential materials. Indeed, as in *New York Tele-*

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14. Following *New York Telephone Co.*, we stated that the basis for "relief against a third party is not culpability, but practical necessity." Pittsburgh-Des Moines Steel Co. v. United Steelworkers of America, 633 F.2d 302, 307 (3d Cir. 1980). *See also* Bullock v. United States, 265 F.2d 683, 690-91 (6th Cir. 1959) (§1651 grants power to enjoin non-parties to prevent interference with valid court order).

phone Co., the assistance of this third party might be indispensable since, following *Douglas Oil*, it appears that the district court may not rule on the motion for disclosure without some participation by the state tribunal. In addition, nothing in the record suggests that the court order inflicts unduly burdensome obligations on Judge Wright. The order contemplates a meeting between the United States Attorney and the state judge, to be arranged "at the State Judge's earliest convenience." Although the state judge is directed to make a recommendation of what evidence may constitute *Brady* material, he does not bear the burden of communicating his views to the district court; that obligation is imposed on the government attorney. Further, the district court represents that it will be "available at any time" to consult with the state judge if the latter deems it helpful. Under the circumstances, we conclude that the district court order, although directed to a third party, is conducive to the proper administration of justice, and distributes obligations in a reasonable and non-burdensome mannner.

The status of the appellant as a state court judge raises special concerns. Judge Wright asserts that the instant case poses issues of federal-state "comity," and that the district court, in framing its order, seemed to regard the state court as an inferior tribunal in a unitary court system, rather than as a court of an independent and coordinate judicial structure. In so doing, it is argued, the district judge engendered "needless friction" between the two court systems, in violation of *Juidice v. Vail*, 430 U.S. 327, 334 (1977).

Although mindful of the independent status, qualified by the Supremacy Clause, of the state courts, we fail to see how the order at issue here unduly intrudes into the sensitive area of federal-state relations. The state court judge is not immunized from an order entered pursuant to Section 1651 simply by his status as a *state* offi-

cer. Abundant precedent exists for federal court directives to state officials. *In Price v. Johnston*, for example, the prisoner was in the custody of the State of California, and the order that the Supreme Court ratified directed the state warden to produce the prisoner for his oral argument in federal court.[15] Historically, the ancient writ of habeas corpus ad testificandum, recognized at least since *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 97 (1807), as within a federal court's power to grant, has been used to direct a state official to produce a state prisoner in federal court so that he might testify or stand trial.[16]

Just as status as a state official will not automatically insulate a person from an otherwise proper order issued under the All Writs Act, neither will identity as a member of the judiciary erect an impenetrable barrier to such directives. Again, the historic writs contemplated occasional mandates from one judicial body to another; the writs of habeas corpus ad faciendum et recipiendum[17] and certiorari, for instance, issued between

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15. The most common form of habeas petition, in which a state court prisoner alleges that his custody violates the Constitution or laws of the United States, will, if successful, result in a writ directing a state official to release the petitioner. However, because 28 U.S.C. §2254 explicitly authorizes the granting of this writ, the frequent use of this version of the habeas writ does not bear on a federal court's authority pursuant the All Writs Act to direct state officers.

16. *See* Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Stone v. Morris, 546 F.2d 730, 736-37 (7th Cir. 1976); In re Thaw, 166 F. 71, 74-75 (3d Cir. 1908). *See also* Ex parte Dorr, 44 U.S. (3 How.) 103, 105 (1845).

17. According to Blackstone, the writ of habeas corpus and faciendum et recipiendum "issues out of any of the courts of Westminister Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer . . . to *do and receive* whatsoever the King's court shall consider on

courts. Nonetheless, the combination of state and judicial elements embodied in a state court raises special problems concerning the proper relations of the federal and state sovereigns.[18] A federal court, for example, ordinarily may not issue a writ of mandamus to compel a state court to exercise a jurisdiction entrusted to it,[19] nor may a federal court (with the exception of the Supreme Court) review a decision of a state tribunal through a writ of certiorari.[20] The ban on federal directives to state courts is not absolute, however. Thus the Anti-Injunction Act,[21] while generally forbidding in-

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that behalf." 3 W. Blackstone, Commentaries * 129-32. Chief Justice Marshall, in Ex Parte Bollman, 8 U.S. (4 Cranch) 74, 97-98 (1807), inferred that the Judiciary Act of 1789 did not comprehend the granting of this form of the habeas writ. The reason, Marshall explained, was that the Act prescribed an alternate mode for bringing into federal courts suits brought in state courts against a person having a right to claim the jurisdiction of the courts of the United States: the defendant might, in his first appearance, file a petition and have the case removed to the federal forum.

18. *See* Lehman v. Lycoming County Children's Servs. Agency, No. 79-2466, slip op. at 30 n.14 (3d Cir. Mar. 31, 1981) (in banc) (Adams, J., concurring) ("Because state courts are not inferior courts . . . many uses to which . . . process writs were put at common law are inconceivable within the federal system.").

19. *See* Russell v. Knight, 488 F.2d 96, 97 (5th Cir. 1973) (per curiam); Moye v. Clerk, DeKalb County Superior Court, 474 F.2d 1275, 1276 (5th Cir. 1973); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); *cf.* Smith v. Bourbon County, 127 U.S. 105, 112 (1888) (federal courts without power to issue mandamus to direct state officers in performance of their duties).

20. *See, e.g.*, Superior Court v. United States District Court, 256 F.2d 844, 847 (9th Cir. 1958) (federal court cannot issue writ of certiorari to state court to compel the latter to produce its record); *cf.* Stewart v. Johnston, 97 F.2d 548 (9th Cir. 1938), *cert. denied*, 312 U.S. 677 (1941) (district court has no jurisdiction to issue writ of certiorari to another district court, inasmuch as the two tribunals have coordinate jurisdiction).

21. 28 U.S.C. §2283. The Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by

junctions to stay proceedings in a state court, excepts those injunctions which are necessary in aid of a federal court's jurisdiction or required to effectuate its judgments.[22]

Refinement of the "comity" notions which Judge Wright invokes, and which inform the principles mentioned above, is provided in the line of cases emanating from *Younger v. Harris*, 401 U.S. 37 (1971), one of which, *Juidice v. Vail*, Judge Wright cites as supporting his position. In *Juidice*, the Supreme Court held that a federal court must refrain from adjudicating constitutional or federal law issues brought to it by a plaintiff who has an opportunity to pursue those claims in an ongoing state proceeding.[23] Like the Anti-Injunction Act, and the prohibition on writs of mandamus and certiorari, *Juidice* fundamentally rests on a principle of nonintervention: except in carefully circumscribed situations, the federal courts should not disrupt an ongoing state judicial process, either by preempting the adjudication of

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NOTE 21 — *(Continued)*

Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Supreme Court has interpreted §2283 as a derivative of the principle that "we have . . . in this country two essentially separate legal systems." Atlantic C.L.R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970); for a dissenting view, see Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. Chi. L. Rev. 612 (1971) (when Congress originally enacted the Anti-Injunction Act in 1793, it did not intend to prevent stays effected by writs other than injunction).

22. We do not regard the district court's order as an injunction to stay state court proceedings.

23. The specific issue in *Juidice v. Vail* was whether a federal court could entertain a constitutional challenge to New York's procedures leading to imprisonment for contempt of court, brought by plaintiffs engaged in ongoing contempt proceedings in state court. The Court held that plaintiffs, who had an opportunity to present their federal claims in the state proceeding, were for that reason barred from litigating the claim in federal court. 430 U.S. at 337.

claims that could be brought to the state forum, by directing the state court to stay its proceedings, or by directly interfering in other ways with the natural course of state adjudication.

This principle, which is at the heart of "comity," is inapplicable to the instant case. The order in issue here does not disrupt state proceedings by foreclosing state court adjudication of an issue that could be resolved there. To the contrary, although Neagle is a state court defendant, he was required to present his Rule 6(e) motion for disclosure to the district court, because that court is the guardian of the grand jury materials. Judge Wright, moreover, does not contest this, nor does he maintain that the motion, once initiated in federal court, should have been transferred to the state court for resolution. His position, rather, is that he should have no part in the decision whether to disclose the materials. This case simply does not present an issue that could have been litigated in an ongoing state proceeding, and the "comity" concerns of *Younger*, *Juidice*, and the Anti-Injunction Act — that federal preemption of claims that may be adjudicated in ongoing state court proceedings should be forestalled — do not apply.

IV

We conclude that this appeal is properly before us, inasmuch as the prerequisites of an appealable order, standing, and district court in personam jurisdiction have been satisfied. On the merits, we find that the district court had the power to direct the state court judge

to confer with the United States Attorney, and that the procedure the court devised was within its discretion under Rule 6(e). Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.) 55

Appendix

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FILED
AUG 26 1981
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CLERK

81-376

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

HON. ROBERT A. WRIGHT, JUDGE OF THE COURT OF COMMON PLEAS OF THE 32nd JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,

v.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS : MISC. NO. 79-680
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O R D E R

AND NOW, to wit, this 1st day of November, 1979, upon consideration of the Petition for Disclosure of Grand Jury Evidence made on behalf of John Doe pursuant to Rule 6(e), F.R.Crim.P., it is hereby ORDERED as follows:

1. The United States Attorney or any properly designated Assistant United States Attorney shall compile all of the grand jury evidence in his possession pertaining to the requests for Brady material set forth in the Petition. See Brady v. Maryland, 373 U.S. 83 (1963).

2. After the United States Attorney has reviewed the evidence for Brady material, he shall transport all of the evidence pertaining to the requests set forth in the Petition to the chambers of Judge of the Court of Common Pleas of Pennsylvania (hereinafter the State Judge), and shall meet with the State Judge at the State Judge's earliest convenience.

3. The United States Attorney shall

consult with the State Judge about the contents of the evidence, and shall communicate his views to the State Judge as to what evidence may constitute Brady material, so that the State Judge may make a fully informed determination of what material ought to be produced under Brady, given the facts and circumstances of the case before him.

4. The United States Attorney shall forthwith communicate the State Judge's recommendations to this Court so that this Court can decide what evidence ought to be divulged pursuant to Rule 6(e), and thereafter enter an appropriate Order. Although this Court has no knowledge of the proceedings in state court, it will be available at any time to consult directly with the State Judge if the State Judge deems it helpful.

5. Pursuant to Rule 6(e)(3)(C), the Court, with the utmost deference, is constrained to Order the State Judge not to divulge to any person the contents of any evidence shown to him unless and until this Court so authorizes, nor to docket this Order in the Court of Common Pleas unless the Petitioner's application to this Court is already a matter of record in that proceeding.

This Court is required by circumstances to address, in the space of two days, difficult questions of law and policy which are, to the Court's knowledge, issues of first impression. The petitioner's state criminal trial is to commenc

within six days of the date of this Order, and much remains to be done in the course of those six days. However, a few brief comments are in order so that the reasons for this Court's exercise of discretion are clear on the record.

The Court's discretion must necessarily be guided by the holding in Douglas Oil Co. v. Petrol Stops N.W., ___U.S. ___60 L.Ed.2d 156 (1979). In that case, civil litigants in a federal suit in Arizona applied to a federal district judge presiding over a grand jury in the Central District of California for release of grand jury evidence for use in the civil suit. On review, the Supreme Court held that the judge who presided over the grand jury was required to make written findings as to the need for secrecy, and, thereafter, the civil trial judge was to make an informed decision about whether, and to what extent, disclosure would be warranted under Rule 6(e), given the facts of his case.

The instant petition is made under Rule 6(e)(3)(C)(i), which gives this Court discretionary

authority to order disclosure "preliminarily to or in connection with a judicial proceeding." The law is clear that state judicial proceedings are encompassed within that provision. See, e.g., In re Petition for Disclosure of Evidence Before October, 1959 Grand Jury, 184 F.Supp. 38 (E.D. Va. 1960).

For the record, the Court specifically finds that continued grand jury secrecy as to the matters sought is vitally important. The Petition seeks information relating to matters which are currently under investigation by the grand jury, and disclosure cannot lightly or hastily be ordered.

Hence, the Court is faced with a dilemma arising from the Douglas Oil holding. It would be a clear abuse of discretion to order disclosure without first obtaining information about the case in which the material is to be used. On the other hand, this Court, unlike the California district court in Douglas Oil, cannot ask the presiding

judge in the collateral case to make the final Rule 6(e) determination, because the State Judge is not vested with authority to make the "final decision", Douglas Oil, supra, 60 L.Ed.2d at 169. as to whether disclosure is warranted.[1]

The procedure set forth above will enable this Court to make an informed determination both as to the need for secrecy and the appropriateness of disclosure, and to balance those considerations accordingly.

We hasten to point out that the provision of this Order prohibiting the State Judge from divulging any of the material he reviews is obviously not in any sense a reflection on his integrity. Rather, it is hoped that the Order protects him from any potential claim by the petitioner that the State Judge has a duty to disclose any or all of the

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1. Rule 6(e)(3)(C) empowers the "court" to order disclosure. It is clear that such authority is granted only to federal courts. See Rule 1, and Rule 54(a), F.R.CRIM.P.

evidence he reviews.[2]

In the Court's view, the most sensitive issue at hand is the possibility that conflicting duties will be placed upon the state trial judge. It is conceivable that the State Judge will recommend disclosure of certain material evidence which this Court cannot, in good conscience, order disclosed. The State Judge at that point would be faced with obvious ethical and jurisprudential difficulties in deciding how or whether to proceed with the case before him.

In the unhappy event that that situation arises, either the State Judge or this Court could immediately inform the Petitioner of the fact that the State Judge's recommendation was not accepted in toto, so that the Petitioner can seek expedited

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2. The Court expresses no view as to whether the State Judge is bound by Article VI, cl. 2 of the United States Constitution to uphold the rule of secrecy expressed in Rule 6(e), even though he is not empowered to order disclosure thereunder. Under that provision "the Judges in every State shall be bound [by the laws of the United States]".

federal appellate review. Alternatively, the State Judge, as one who is affected and bound by this Order, might have standing to seek federal appellate review on his own. And, as a last resort, if the State Judge is privy to knowledge, which he cannot divulge, which indicates to him that the Petitioner will not receive a fair trial unless disclosure is made, he can dismiss the prosecution sua sponte. The costs of such a step to the interests of the state would be considerable, but one could imagine situations where the costs of grand jury disclosure would be even higher. Under all the circumstances of this case, the Court believes that the procedure set forth herein is reasonably calculated to balance all competing interests.

AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, Jr.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS	:	MISC. No. 79-680

O R D E R

AND NOW, to wit, this 22nd day of September, 1980, upon consideration of petitioner's motion for compliance with this Court's Order of November 1, 1979, it is hereby Ordered that the motion is GRANTED. Judge Wright is directed to meet and confer with the United States Attorney regarding the existence of any Brady material in the grand jury evidence.

In the November 1, 1980 Order, this Court set out what it considered an orderly procedure for disclosure of grand jury materials sought by a state criminal defendant pursuant to Rule 6(e) F.R.Crim.P. The order requested Judge Wright, the presiding judge in the state criminal proceeding, to meet with the United States Attorney and to rec-

ommend what grand jury material ought to be produced under Brady v. Maryland, 373 U.S. 83 (1963). Judge Wright, however, declined to review the material, and appealed the November 1, 1979 Order. The Third Circuit subsequently dismissed Judge Wright's appeal for lack of standing, concluding that "the order in question [did not] require the appellant to inspect the information or to confer with the United States Attorney." In Re Grand Jury Proceedings, No. 79-2805 Slip Op. at 5 (3d Cir. July 8, 1980).

ENTERED: FILED SEP 23 1980

CLERK OF COURT

Following the Third Circuit's Opinion, Judge Wright formally declined to review the grand jury material at issue. Accordingly, in order to insure that petitioner's rights are protected, the Court is compelled to direct Judge Wright to meet and confer with the United States Attorney regarding the existence of any Brady material.

AND IT IS SO ORDERED.

/S/
Clarence C. Newcomer, J.

Opposition

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Office - Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-376

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1981

IN RE: GRAND JURY PROCEEDINGS (WRIGHT II) HON. ROBERT A. WRIGHT, JUDGE OF THE COURT OF COMMON PLEAS OF THE 32ND JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT, GEORGE NEAGLE'S, BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Whether the District Court below abused its discretion by allocating the authority for disclosure of Grand Jury material under Rule 6 of the Federal Rules of Criminal Procedure, in such a manner so that each interested tribunal evaluates that part of the disclosure of which it is most knowledgeable.

LIST OF PARTIES

Petitioner-Appellant, The Honorable Robert A. Wright

Respondent-Appellee, George Neagle

Respondent-Appellee, U.S.A.

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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U.S. Const. Amend. VI 2, 4, 7, 8, 9, 10

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of and the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

The Federal Rules of Criminal Procedure, Rule 6 (Pertinent text set forth in Appendix, as R2) ... 4, 5, 6, 10

28 U.S.C.A. United States Supreme Court Rule 17 (Pertinent text set forth in ARGUMENT) 5

No. 81-376

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1981

IN RE: GRAND JURY PROCEEDINGS (WRIGHT II) HON. ROBERT A. WRIGHT, JUDGE OF THE COURT OF COMMON PLEAS OF THE 32ND JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT, GEORGE NEAGLE'S, BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The Petitioner, the Honorable Robert A. Wright, is a Judge currently presiding over homicide proceedings in the Court of Common Pleas of Delaware County in the matter of *Commonwealth of Pennsylvania v. George Neagle*, No. 2643 and 2647 of 1979, charging the defendant with possessing instrument of a crime, recklessly endangering another person, aggravated assault, involuntary manslaughter, murder and simple assault. The date of the alleged offense is May 11, 1979. The alleged homicide victim is Thomas Manley, and the alleged vic-

tim of the aggravated assault is one, Leonard Milano, Jr. Leonard Milano, Jr. is the chief Commonwealth witness in the prosecution against George Neagle.

In October of 1979, George Neagle filed a Motion to Produce Evidence, a copy of which is attached to Appendix, "R1-5". The Honorable Robert A. Wright, after hearing testimony of two witnesses, including Thomas McBride, Esquire (Assistant United States Attorney), was of the opinion that he could not issue an Order to produce Grand Jury material if, in fact, said material was, pursuant to a Federal Court Order, unable to be disclosed at the time of the hearing. Judge Wright advised counsel for George Neagle that he should file a Motion in Federal Court seeking a Federal Court Order for disclosure of said material.

In October of 1979, George Neagle, by his attorney, filed a Motion in the United States District Court for the Eastern District seeking disclosure of Grand Jury material for use in the defense of the charges against him in the Court of Common Pleas of Delaware County. The District Attorney's Office of Delaware County, the United States Attorney's Office for the Eastern District of Pennsylvania, and the Honorable Robert A. Wright, the Presiding Judge of the Court of Common Pleas of Delaware County, were each provided with a copy of the Motion for Disclosure of Grand Jury Material and Memorandum of Law accompanying said Motion. Said Motion requests Grand Jury material relative to the investigation of Leonard Milano, Jr., which is exculpatory in nature within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1978), which if denied to defendant, George Neagle, would deny him his right of confrontation under the Sixth Amendment of the United States Constitution as it relates to the cross-examination of Leonard Milano, Jr. and the production of defense evidence to rebut the Commonwealth evidence. See Exhibit "R1-1" of Appendix.

The Honorable Clarence C. Newcomer, Judge of the District Court, entered an Order dated November 1, 1979, pursuant to Respondent's Motion. Said Order is attached to the Petition for Writ of Certiorari as an Exhibit. This Order instructed the United States Attorney to deliver the Grand Jury material in his possession to Judge Wright. After consultation with the United States Attorney, Judge Wright was to determine what material, in his opinion, should be made available to Respondent, George Neagle, using the standards set forth in *Brady v. Maryland*, supra. Thereafter, the United States Attorney was then to communicate Judge Wright's opinions to Judge Newcomer, who would then make the ultimate decision on which material would be turned over to Mr. Neagle.

Judge Wright took an appeal from Judge Newcomer's Order dated November 1, 1979.

Judge Wright's appeal was argued May 23, 1980 before a panel of the United States Court of Appeals for the Third Circuit, and this Court's opinion was filed on July 8, 1980, which is attached to Petitioner's Brief. See *In Re: Grand Jury Proceedings (Appeal of Robert A. Wright)*, 625 F. 2d 1106 (3rd Cir. 1980) (per curiam). This appeal was dismissed on the ground that Judge Wright lacked standing to appeal from the Order of the District Court.

On August 26, 1980, George Neagle, through his attorney, filed a Motion for Compliance with the District Court's Order. Judge Wright filed a Reply to this Motion on August 28, 1980. On September 23, 1980, the District Court then entered its Order from which Judge Wright took a second appeal. On October 9, 1980, pursuant to a Motion of Judge Wright, the District Court entered a stay of its September 23, 1980 Order pending the outcome of his appeal. Judge Wright's Notice of Appeal was filed on October 16, 1980.

The second appeal of Judge Wright before a panel of the United States Court of Appeals for the Third Circuit

was argued on March 26, 1981, and filed June 30, 1981. See *In Re: Grand Jury Proceedings (Wright II)*, ____ F. 2d ____ (3rd. Cir. 1981), No. 80-2585 Slip Opinion, copy of which is attached to Petitioner's Brief as Exhibit "D". In upholding the decision of the District Court, the U.S. Court of Appeals for the Third Circuit upheld the authority of District Court to Order the State Court Judge to confer with the United States Attorney and found the procedure for disclosure of the *Brady v. Maryland* material devised by the District Court to be within its discretion under Rule 6(e). It is from this decision that Judge Wright filed his Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The District Court properly adopted and applied the standard set forth by the Supreme Court of the United States in *Douglas Oil Co. v. Petrol Stops Northwest*, 411 U.S. 211 (1979) by dividing the review of the materials to be disclosed under the Federal Rules of Criminal Procedure, Rule 6(e), between the interested tribunals in a manner such that the criminal defendant's Sixth Amendment rights are protected while maintaining the secrecy required in Grand Jury Proceedings.

ARGUMENT

The procedure established below for determining disclosure of Federal Grand Jury material to State defendants in State criminal proceedings does not constitute an abuse of discretion and does not constitute undue interference with State Court proceedings by the Federal Court.

The United States Supreme Court Rule 17 states:

> "[A] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." 28 U.S.C.A., Supreme Court Rule 17.

It is submitted that the resolution of the issues of this particular case by the District Court negates any potential necessity for review on writ of certiorari. Specifically, there is no abuse of discretion by the District Court in compelling Judge Wright to assist the District Court in deciding what material, if any, should be disclosed to defense counsel for George Neagle. Furthermore, while this case does present this Court with an issue of first impression, it is respectfully submitted that this Court in *Douglas Oil Co. v. Petrol Stops Northwest* adopted the standard for disclosure of Grand Jury information to a collateral proceeding outside the jurisdiction of the Court presiding over the Grand Jury itself.

The Supreme Court, in *Douglas*, readily admitted that it had no prior occasion to consider which Court or Courts may direct disclosure of Federal Grand Jury Minutes under the Federal Rules of Criminal Procedure 6 (e). The Court stated:

> "Indeed, those who seek Grand Jury transcripts have little choice other than to file a request with the Court that supervises the Grand Jury, as it is the only Court with control over the transcripts." 411 U.S. at 225.

It is submitted that Judge Wright, himself, recognized that the only Court who could direct disclosure of the Grand Jury Minutes requested by defense counsel was the lower Court when he refused to disclose the Minutes of the Grand Jury, without a Federal Court Order.

Significantly, the Supreme Court in *Douglas* also stated:

> "It does not follow, however, that in every case the Court in which the Grand Jury sat should make the final decision where the request for disclosure under Rule 6 (e) should be granted. Where, as in this case, the request is made for use in a case pending in another jurisdiction, the Judges of the Court having custody of the Grand Jury transcripts will have no first hand knowledge of the litigation in which the transcripts allegedly are needed and no practical means by which such knowledge can be obtained. In such a case, a Judge in the District of the Grand Jury cannot weigh in an informed manner the need for disclosure against the need for maintaining Grand Jury secrecy. Thus, it may well be impossible for that Court to apply the standard required by the decisions of this Court, reiterated above, for determining whether the veil of secrecy should be lifted." 411 U.S. at 226.

The Supreme Court, in its Opinion, adopted as a standard for evaluating the issue of whether there is a particularized need for disclosure when more than one jurisdiction is involved, *the need for collaboration between the Court of the Grand Jury and the Court of the collateral proceeding in deciding whether the transcripts should be released under Rule 6 (e)*. Specifically, the Court concluded:

> "[T]he better practice would have been for the District Court, after making a written evaluation of the need for continued Grand Jury secrecy and the de-

termination that the limited evidence before it showed that disclosure might be appropriate, to have sent the requested material to the Courts where the civil cases were pending. The Arizona Court, armed with their special knowledge of the status of the civil actions, then could have considered the request for disclosure in light of the California Court's evaluation of the need for continued Grand Jury secrecy. In this way, both the need for continued secrecy and the need for disclosure could have been evaluated by the Courts in the base position to make the respective evaluations." 411 U.S. at 230.

It is respectfully submitted that the lower Court, in its Order, complied with the mandate of the Supreme Court as set forth above. Judge Newcomer, in his Order, made specific provisions to provide Judge Wright who was presiding over the collateral proceeding to review the material requested to determine the need for disclosure and then make said recommendations to Judge Newcomer.

It is important to note that the materials requested were pursuant to the defendant's rights under the Sixth Amendment to the United States Constitution. Hence, the lower Court was confronted with an issue dealing with a serious Federal Constitutional right of George Neagle, as opposed to a State right being asserted by Mr. Neagle.

Petitioner alludes to the notion of comity — the recognition that the State and Federal Courts are independent systems and that Federal Courts should respect the functions of the State Courts and avoid needless friction between the two Court systems. See Petitioner's Brief, p. 17.

The notion of comity is exemplified by the cooperative action between Courts of different jurisdiction such as in the instant case. *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Zellen v. Second New Haven Bank*, 454 F.

Supp. 1359 (D.C.Conn. 1978) are two cases illustrative of the notion of comity. In *Mapp*, the Supreme Court of the United States stated:

> "Healthy federalism depends upon avoidance of needless conflicts between State and Federal Courts." 367 U.S. 643.

It is where an individual has a federally secured right that a potential conflict may arise between a State and Federal Court.

George Neagle has asserted his Sixth Amendment right, which is a federally secured right, that is binding on State Courts. State Courts, as well as Federal Courts, are ultimately controlled by the United States Constitution. In *Young v. Board of Education of Fremont County School District*, 416 F. Supp. 1139 (D.C. Colo. 1976), the Court stated:

> "Federal and State Courts have equal responsibility to give meaning to federally secured rights and to adjudicate issues where those rights are claimed. The fact that Federal Courts operate in the field does not preclude similar activity by State Judicial forum." 416 F. Supp. at 1142.

In the instant case, Judge Wright has refused to render a decision on the defendant's Sixth Amendment rights where Grand Jury material is involved. Judge Wright has deferred any ruling to the Federal Court, since it has the ultimate jurisdiction to determine the issues involved in the defendant's Motion for the Production of Evidence. It would have been an abuse of discretion by the lower Court not to intervene between the defendant and his Sixth Amendment rights under the United States Constitution with respect to the disclosure of Federal Grand Jury information as it relates to the State Court proceeding. Essentially, Judge Wright, by failing to act, was not complying with the defendant's rights under the Federal Constitution, as set forth under the Sixth Amendment in *Brady v. Maryland*, supra. In

Newman v. Alabama, 466 F. Supp. 628 (D.C. Ala. 1979), the Court conferred power on the Federal Court over the State Court where constitutional rights were not granted in the State Court. *When a State Court fails to comply with the Federal Constitution the Federal Courts are compelled to enforce it. Newman v. Alabama*, supra.

It is respectfully submitted that the defendant's having been deprived of his rights under the Sixth Amendment by the State Court is a contradiction to the notion of comity and causes friction between the State and Federal Courts. This jurisdictional conflict should be remedied by affording the defendant his constitutional rights in the Federal Court that he has not been given in the State Court; namely, disclosure of all pertinent Grand Jury information.

Judge Wright, in any State criminal proceeding where *Brady* material is requested, has the option to review the material himself *in camera*, or turn it over to defense counsel for his review. In this case, the lower Court presented Judge Wright with a situation where he must review material to determine whether it is, in fact, favorable to the defendant. Many trial judges, both State and Federal, are confronted with the issue of conducting *in camera* inspections to determine whether there is *Brady* material contained within a prosecutor's file. Judge Newcomer has afforded Judge Wright an opportunity, if indeed Judge Newcomer disagrees with Judge Wright's evaluation of the evidence, to take an appeal himself or to dismiss the prosecution. Surely, if there is evidence which is exculpatory or favorable to the defendant, which the Federal Court will not disclose, it is incumbent upon Judge Wright to take whatever steps are necessary, as presiding Judge, to secure the defendant's protected rights under *Brady v. Maryland*, supra, by either taking an appeal himself or dismissing the prosecution. Surely, if he were to discover exculpatory material in a State proceeding that did not involve a Federal Grand Jury and the prosecutor refused to disclose said

Brady material, the Court would have had no alternative but to dismiss the prosecution, which is no different a remedy than is being set forth in Judge Newcomer's Order.

Douglas Oil leaves great discretion to the Court presiding over the Grand Jury to determine how best to gauge the need for disclosure without recourse to the Trial Court.

It is respectfully submitted that a serous constitutional right of the defendant under the United States Constitution is in jeopardy in this case. It appears both the lower Court and Judge Wright recognize the defendant's Sixth Amendment rights, but are in disagreement as to the manner in which his rights should be protected. Judge Wright necessarily, by presiding over the trial, must make decisions at the time of trial as to what evidence is relevant, admissible, and exculpatory in nature under the meaning of *Brady v. Maryland*, supra. Judge Wright is a necessary party to the instant action and collaboration between the lower Court and Judge Wright appears to be a necessary step in determining what, if any, evidence must be disclosed pursuant to Rule 6(e).

In light of the serious Federal right in question, and the inability of the State Court to resolve the Federal rights due to the secrecy of the Grand Jury, it becomes imperative for Federal Court intervention. Clearly, Judge Wright did not and would not issue any Order compelling disclosure of Grand Jury material due to his lack of authority to make such a disclosure. Thus, the defendant's constitutional rights, in order to be effectively asserted and maintained throughout the trial, needed the intervention of the Federal Court, as perceived by counsel for George Neagle and Judge Wright himself.

The theory of comity as envisioned by the Petitioner's Brief fails to recognize that a basic premise to the notion of comity is the ability of a State Court itself to deal

with the issues involved in the State proceeding. In the instant case, the State Court cannot resolve the issue before it. It was necessary for the defendant himself to file a Motion in the lower Court to avail himself of the relief sought.

The lower Court was not treating the Court of Common Pleas as a subordinate Court, but as a Court that was an integral part of the decision making process of the lower Court on the need for disclosure.

In conclusion, it is submitted that Judge Newcomer's Order in this case is a reasonable and practical solution to the problem involved. In essence, it merely requests the State Judge, who has greater knowledge of the facts, to assist in a discovery process. Furthermore, Judge Newcomer's Order is essentially an ongoing Order. For example, it may be that during the trial, the State Trial Judge will discover that additional Grand Jury evidence should be disclosed. If the Trial Judge has not previously reviewed the data *in camera*, he will have no way of knowing this. In such instance, Judge Wright would inform Judge Newcomer of this fact and request a supplemental Order of Disclosure. The present Order is, therefore, a practical way to secure a just result.

It is respectfully submitted that the lower Court did not abuse its discretion.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Carmen P. Belefonte
Attorney for George Neagle

R1-1

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY :
PROCEEDINGS :
:
:
:

MOTION FOR DISCLOSURE OF MATTERS OCCURRING BEFORE GRAND JURY PURSUANT TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Petitioner, George Neagle, by his attorney, CARMEN P. BELEFONTE, ESQUIRE, moves this Honorable Court to enter an Order pursuant to Rule 6 of the Federal Rules of Criminal Procedure requiring the Government to provide certain information and documents, as more specifically set forth herein, on or before NOVEMBER 1, 1979, and avers the following facts in support thereof:

1. The Petitioner, George Neagle, is presently a defendant in the cause of *Commonwealth of Pennsylvania v. George Neagle,* No. 2643 and 2647 of 1979, charging him with possessing instrument of crime/prohibited offensive weapon, recklessly endangering another person, aggravated assault, involuntary manslaughter, murder and simple assault. The date of said alleged offense is May 11, 1979.

2. An alleged victim and the chief Commonwealth witness in the prosecution against the Petitioner is one, Leonard R. Milano, Jr.

3. Leonard R. Milano, Jr. has been the subject matter of a twenty-two month investigation by the Federal Bureau of Investigation, the Bureau of Alco-

hol, Tobacco and Firearms of the United States Government, and the Delaware County Criminal Investigation Division.

4. On or about September 12th, 1979, the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms and the Delaware County Criminal Investigation Division, in conjunction with each other, obtained and executed a search warrant for the business premises of Leonard R. Milano, Jr. at 912 Springfield Road, Collingdale, Delaware County, Pa.

5. The nature and scope of the investigation involving Leonard R. Milano, Jr. includes, amongst other things, illegal trafficking of weapons, loansharking, bookmaking, and other criminal activities. During the course of this investigation, the Federal authorities had an undercover agent working as a business associate of Leonard R. Milano, Jr.

6. In conjunction with the investigation, there was an electronic surveillance or wiretapping of Leonard R. Milano, Jr.'s place of business.

7. The above mentioned investigation took place during that period of time in which the defendant, George Neagle, is alleged to have committed a homicide. The place of the offense in which the defendant is charged in the case of *Commonwealth v. Neagle* is in the vicinity of 912 Springfield Road, Collingdale, Pennsylvania.

8. There is presently pending in the Eastern District of Pennsylvania a Federal Grand Jury proceeding, focusing on various individuals, including Leonard R. Milano, Jr.

9. The defendant, George Neagle, has filed a Motion to Produce Evidence, a copy of which is attached hereto as Exhibit "A", requesting the Commonwealth of Pennsylvania to produce, through its Criminal Investigation Division, any evidence of this investigation which may be considered excul-

patory evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963).

10. Due to the secrecy of the Grand Jury, the defendant has been denied access to any information by the Delaware County Criminal Investigation Division of United States Attorney's Office which is relevant to the facts surrounding the alleged homicide on May 11, 1979.

11. The petitioner, in his request for discovery of Grand Jury material, is seeking only that evidence which upon inspection would be relevant to the charges against Petitioner, George Neagle, and is exculpatory in nature, including but not limited to:

a) statements made by Leonard Milano relating to the alleged homicide on May 11, 1979;

b) evidence of possession of firearms on or about May 11, 1979;

c) evidence of acts of violence by Leonard Milano;

d) witnesses to the alleged homicide;

e) corporate books and records of Shortstop Vending, Inc. and Lenny's Service Center reflecting names and addresses of shareholders;

f) evidence of business relationship between Leonard Milano and Darby Borough and/or Collingdale Borough Police Officers.

12. It is believed, and therefore averred, that the above enumerated evidence within the Grand Jury investigation involving Leonard R. Milano, Jr. is exculpatory evidence within the meaning of *Brady v. Maryland*, Supra, which if denied to the defendant, George Neagle, would deny the defendant his right of confrontation under the Sixth Amendment of the United States Constitution

WHEREFORE, it is respectfully requested that this Honorable Court enter an Order requiring the United

States Attorney's Office, Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms, and the Delaware County Criminal Investigation Division to turn over to defense counsel all evidence within the Grand Jury investigation that is exculpatory or may be exculpatory within the meaning of *Brady v. Maryland*, Supra, or alternatively, that this Honorablef Court conduct an in camera inspection to make the aforesaid determination.

Carmen P. Belefonte
Attorney for Petitioner

R1-5

Exhibit "A"

IN THE
COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	No. 2643 & 2647
vs.		
GEORGE NEAGLE		
Defendant	:	of 1979

MOTION TO PRODUCE EVIDENCE

The defendant, George Neagle, through his attorney, CARMEN P. BELEFONTE, ESQUIRE, makes the following motion:

1. The defendant, George Neagle, by his attorney, previously filed Motions for Discovery in July of 1979. Since the Discovery Motion was filed prior to trial, it has come to the attention of attorney for the defendant that the Commonwealth, in conjunction with the Federal Government, have been conducting a twenty-two (22) month investigation into the criminal activities of the chief Commonwealth witness, Leonard Milano. From newspaper accounts, it appears that the Commonwealth, in conjunction with the Federal Government, have seized certain records from Leonard Milano's place of business, 912 Springfield Road, Collingdale, Pennsylvania, as well as from several Darby Police Officers, indicating criminal activity.

2. It is believed, and therefore averred, that the evidence which is the subject matter of this investigation contains exculpatory evidence as it relates to the relationship between Leonard Milano and the Darby Borough Police Department, which has been

involved in the investigation of the instant case, as well as evidence of illegal activity which will bear on the credibility of Leonard Milano, and possibly other Commonwealth witnesses.

3. Defense counsel requests the Commonwealth produce for inspection the results of said investigation as material which may be exculpatory under the rationale of *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 415 U.S. 150 (1970).

WHEREFORE, defendant respectfully requests this Honorable Court to compel the Criminal Investigation Division, in conjunction with the Federal Government, to produce that information requested above.

Carmen P. Belefonte
Attorney for Defendant

RULES OF CRIMINAL PROCEDURE

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be

deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings.—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occuring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in

such manner, at such time, and under such conditions as the court may direct.

(4) Sealed Indictments.—The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95-78, §2(a), 91 Stat. 319; Apr. 30, 1979, eff. Aug. 1, 1979.)

PROOF OF SERVICE

I hereby certify that on this 25th day of September, 1981, I personally caused to be served by mailing, prepaid and first class, United States Mail, a copy of the Brief in Opposition to Petition for Writ of Certiorari to:

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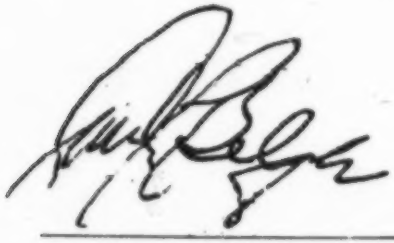

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Opposition

2

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CLERK

No. 81-376

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT A. WRIGHT, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in ordering petitioner, a state judge, to confer with the United States Attorney concerning the request under Fed. R. Crim. P. 6(e) by a criminal defendant on trial before petitioner for the disclosure of federal grand jury materials.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-376

ROBERT A. WRIGHT, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. D 1-24) is reported at 654 F. 2d 268.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981. The petition for a writ of certiorari was filed on August 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a judge of the Pennsylvania Court of Common Pleas, currently presides over criminal proceedings against respondent George Neagle. The Commonwealth of Pennsylvania has charged Neagle with, *inter alia*, assaulting and shooting Leonard Milano and Thomas Manley in May 1979. Manley died from injuries incurred during the incident; Milano survived, although he was wounded. It is

expected that Milano will be a principal prosecution witness against Neagle in the state criminal trial. Pet. App. C 2, D 2.

At the time of the shooting, a federal grand jury in the Eastern District of Pennsylvania was investigating various alleged criminal activities by Milano.[1] As part of his discovery in connection with the state criminal prosecution, Neagle filed a motion in the federal district court under Fed. R. Crim. P. 6(e) for disclosure of any grand jury materials relating to Milano that might prove exculpatory (Pet. App. D 3).

In ruling on the motion, the district court specifically found that continued grand jury secrecy was "vitally important" because Neagle sought information relating to matters that were then "currently under investigation by the grand jury" (Pet. App. A 2). Accordingly, the court concluded that disclosure "[could not] lightly or hastily be ordered" (*ibid.*). Moreover, the court observed (*ibid.*) that, in light of this Court's decision in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1972),[2] it would be a clear

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[1] We have been informed by the U.S. Attorney's Office that the grand jury subsequently returned indictments against Milano and other individuals on charges relating to gambling activities. Milano entered a plea of guilty while the instant case was pending before the court of appeals on petitioner's second appeal. See page 5, *infra*.

[2] *Douglas Oil* involved a request by a private party pursuant to Fed. R. Crim. P. 6(e) for disclosure of grand jury transcripts for use in connection with a civil antitrust action against companies whose employees had testified before the grand jury. The federal district court in California that had supervised the grand jury ordered release of the transcripts, even though that court acknowledged that it had no knowledge of the civil damage action pending in the federal district court in Arizona. This Court held the release under such circumstances to be an abuse of discretion. The Court concluded that the disclosure determination required coordination with the district court in Arizona, because only the latter had sufficient knowledge of the civil action to make an

abuse of discretion to order disclosure of the grand jury materials without first obtaining information about the judicial proceedings—here, the state criminal trial—in which they would be used. However, the district court concluded that, unlike the district court that had supervised the grand jury proceedings in *Douglas Oil* (see note 2, *supra*), it could not ask the judge presiding over the collateral proceedings for which the grand jury materials were sought to make the final determination regarding the disclosure of grand jury materials under Rule 6(e); in the court's view, the state judge presiding at respondent Neagle's state criminal trial did not have authority to order the release of federal grand jury materials under Fed. R. Crim. P. 6(e).

To meet this problem, the district court fashioned an order under Rule 6(e) that enabled it to coordinate with the state court but to retain for itself the final determination regarding the release of the materials to Neagle. Under the district court's order, the United States Attorney (or one of his assistants) was to compile the grand jury materials in his possession in response to Neagle's request for disclosure. The U.S. Attorney was then to transport the materials to the chambers of the state court judge—petitioner herein—and meet with him at the latter's earliest convenience. Specifically, the U.S. Attorney was directed to consult with petitioner about the contents of the grand jury materials in

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informed decision about the need for the grand jury materials in connection with those proceedings. 441 U.S. at 224-230. In *Douglas Oil*, the Court held that the appropriate way to accomplish this coordination was for the district court in California to make a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it indicated that disclosure might be appropriate; that court should then have sent this determination and the requested materials to the federal district court in Arizona, which could then make a final decision on the disclosure request, armed with the evaluation by the district court that had supervised the grand jury.

an attempt to ascertain what portion of the grand jury proceedings might constitute materials that should be disclosed to Neagle under the standards established by this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963);[3] through this consultation, petitioner could "make a fully informed determination of what material ought to be produced under *Brady*, given the facts and circumstances of the case before him" (Pet. App. A 1). The U.S. Attorney was then to communicate petitioner's recommendation to the district court so that the latter court could make a final determination regarding the disclosure of material under Rule 6(e). In order to facilitate the disclosure determination, the district court stated that it would be available to consult with petitioner at any time if petitioner deemed it helpful. Pet. App. A 1.

2. The district court's order was not implemented, because petitioner declined to review the materials (Pet. App. B 1) and instead filed an appeal from the district court's order. In an opinion filed July 8, 1980 (Pet. App. C 1-12), the court of appeals dismissed the appeal. The court reasoned that the order was directed solely to the U.S. Attorney and did not compel petitioner to take any action or otherwise bind him unless and until he actually reviewed the grand jury materials and conferred with the U.S. Attorney. *Id.* at 4-5. Because petitioner was free under the district

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[3]The Court held in *Brady* that suppression by the prosecution of evidence in its possession favorable to the accused, when the accused has requested it, violates due process if the evidence is material either to guilt or to punishment. The decision in *Brady* v. *Maryland* is not directly involved here, because the evidence in question is in the possession and custody of the federal government, not the state prosecutor or court responsible for Neagle's trial. However, we assume for present purposes that a defendant in a state criminal trial ordinarily would establish the requisite particularized need for disclosure of federal grand jury materials if he demonstrates that disclosure of the materials in question, if in the possession of the state prosecutor, would be required under this Court's decision in *Brady*.

court's order to avoid involvement in reviewing the materials and consulting with the U.S. Attorney and had indicated to the court of appeals that he did not intend to do so, the court found no imminent threat of injury to petitioner that would confer standing on him to prosecute the appeal. *Id.* at 5-7.[4]

3. Following the court of appeals' decision, petitioner formally declined to review the grand jury materials. Pet. App. D 2-3. Neagle, the state court defendant, then filed a motion in federal district court to require petitioner to comply with that court's prior order. Petitioner filed a reply to the motion. Pet. App. D 3. The district court, in granting the motion, noted that its prior order had "set out what it considered an orderly procedure for disclosure of grand jury materials sought by a state criminal defendant pursuant to Rule 6(e) F. R. Crim. P." (Pet. App. B 1). However, in view of petitioner's unwillingness to review the materials voluntarily and "in order to insure that [Neagle's] rights are protected," the court concluded that it was "compelled to direct Judge Wright to meet and confer with the United States Attorney regarding the existence of any *Brady* material" (*id.* at 2).

4. Petitioner again appealed, and the court of appeals affirmed. Pet. App. D 1-24. The court of appeals concluded that the district court had authority under the All Writs Act, 28 U.S.C. 1651(a),[5] to require petitioner to meet and confer

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[4]Judge Gibbons dissented from the judgment dismissing the appeal. Pet. App. C 7-11. He would have reached the merits and affirmed the district court's order, finding that it was not an abuse of discretion under *Douglas Oil Co.* v. *Petrol Stops Northwest, supra.* Pet. App. C 11-12.

[5]Section 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

with the U.S. Attorney on the disclosure issue, finding "no doubt" (Pet. App. D 16) that the order was necessary or appropriate in aid of the district court's jurisdiction to rule on Neagle's motion under Fed. R. Crim. P. 6(e).

The court of appeals also rejected petitioner's apparent suggestion that his status as a state court judge immunized him from an otherwise proper order issued under the All Writs Act. Pet. App. D 19-23. The court acknowledged that this status raised special problems of federal-state relations in a case such as this, but it concluded that the principles of comity announced in this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny were not violated here because the federal court's order did not disrupt state court proceedings by foreclosing adjudication in state court of issues that could be resolved there. Pet. App. D 22-23. "To the contrary," the court of appeals reasoned, "although Neagle is a state court defendant, he was required to present his Rule 6(e) motion for disclosure to the [federal] district court, because the court is the guardian of the grand jury materials." Pet. App. D 23.[6]

Finally, having concluded that the district court's order was authorized by the All Writs Act, the court of appeals further concluded that the order did not constitute an abuse of the discretion vested in the district courts under Rule 6(e) to fashion the proper response to requests for disclosure of grand jury materials. Pet. App. D 8-14. In this regard, the court observed that under *Douglas Oil* it would have been an abuse of discretion for the federal district court, without receiving the views of the state judge presiding over Neagle's criminal trial, to determine both the need for continued

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[6]The court of appeals noted that petitioner did not dispute this point or contend that the Rule 6(e) motion should have ben transferred to state court. "His position, rather, is that he should have no part in the decision whether to disclose the materials" (Pet. App. D 23).

grand jury secrecy and Neagle's interest in disclosure. Accordingly, the court concluded that the district court was required to coordinate with the state court. Pet. App. D 10. In the court's view, the flexible procedure fashioned by the district court here—providing for continuing consultation with the state court but retaining the final authority to grant or deny the request for disclosure—"vindicates the policies underlying *Douglas Oil*" (Pet. App. D 12) by involving each court in the disclosure determination.

ARGUMENT

Petitioner does not contend that a federal district court is without authority under the All Writs Act to issue an order, such as that involved here, that is directed to a state judge. He argues only that the order in this case constituted an abuse of discretion. Contrary to petitioner's contention, however, the decision by the unanimous court of appeals affirming the district court's order reflects a reasonable accomodation of the competing interests involved in the particular facts of this case, in which a state criminal defendant seeks disclosure of federal grand jury materials under Fed. R. Crim. P. 6(e). The decision below also is fully consistent with the decision in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), in which this Court held that the court that supervised the grand jury and the court presiding over the separate proceedings should both play a role in the disclosure decision. Petitioner concedes (Pet. 19) that this case is one of first impression. Especially under these circumstances, the manner in which the district court exercised its conceded discretion in the facts of this case does not warrant further review.[7]

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[7]While the matter is far from certain, in the particular circumstances of this case we believe the court of appeals correctly held the order requiring petitioner to meet and confer with the U.S. Attorney to be appealable under 28 U.S.C. 1291. See Pet. App. D 4-5. As the court of appeals observed, the district court conclusively determined petitioner's

1. Petitioner does not take issue with the court of appeals' holding (Pet. App. D 15-19) that the district court had authority under the All Writs Act, 28 U.S.C. 1651(a), to direct him to meet and confer with the U.S. Attorney regarding the existence of evidence in the grand jury materials that should be turned over to Neagle. This holding is correct in any event.

Section 1651(a) authorizes the district courts to issue all writs "necessary or appropriate in aid of their respective jurisdictions." The order here plainly was "in aid of" the district court's jurisdiction to pass on Neagle's Rule 6(e) motion; and, given the limitations imposed by the Court in *Douglas Oil* on unilateral action by the district court that supervised the grand jury (see note 2, *supra*), the district court's order providing for involvement of the state court in the disclosure decision was both "necessary" and "appropriate" to enable the district court to decide the Rule 6(e) motion on an informed basis.

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obligations in this case; the question of how responsibility for reviewing grand jury materials should be allocated between state and federal courts is distinct from the merits of Neagle's disclosure request; and it does not appear that petitioner could obtain review of the order on an appeal of the district court's ultimate decision on the Rule 6(e) motion. Although petitioner could perhaps refuse to comply and risk a citation for contempt in order to force appellate review, petitioner's official status in our federal system and the friction that might arise in federal-state relations by requiring a state judge to be cited for contempt counsel against such requirements. Cf. *United States* v. *Nixon*, 418 U.S. 683, 691-692 (1974). Moreover, to the extent that Section 1291 is construed to bar interlocutory appeals because of the disruption they create in on-going proceedings in federal court, that policy is not significantly implicated here. The principal effect of any delay occasioned by petitioner's appeal is in the state criminal proceedings, over which petitioner himself presides. Although a delay has also resulted in the federal proceedings relating to Neagle's Rule 6(e) motion, those proceedings are in aid of the state criminal trial. This delay therefore does not frustrate congressional policy regarding the expeditious conduct of federal proceedings.

Several other factors reinforce the appropriateness of the order under the All Writs Act as well. The state court judge is not "a third party so far removed from the underlying controversy that [his] assistance could not be permissibly compelled" (*United States* v. *New York Telephone Co.*, 434 U.S. 159, 174 (1977)); to the contrary, he presides at Neagle's state criminal trial and is therefore knowledgeable about the nature of those proceedings, a factor that must be weighed in the disclosure decision under Rule 6(e). Nor can the review of grand jury materials for exculpatory evidence and the making of a recommendation about the disclosure of such materials be thought to be inherently "offensive" or "burdensome" to the state court. See *United States* v. *New York Telephone Co., supra*, 434 U.S. at 174-175. State courts must rule on *Brady* motions as a regular aspect of the conduct of criminal trials and, in doing so, must often review the disputed materials.[8] Indeed, petitioner concedes that if he had been vested by the district court with the authority to make the final determination on disclosure, "the task of reviewing the material to ascertain its utility to the defense would perhaps not be unreasonable" (Pet. 16, citing *Douglas Oil*). Moreover, the district court's order requires petitioner only to "meet and confer" with the U.S. Attorney (Pet. App. B 2); it does not require petitioner personally to review voluminous grand jury materials.[9] It

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[8]In this respect, the case is much like *United States* v. *New York Telephone Co., supra*, in which the company resisting the district court's order to cooperate in the installation of pen registers conceded that it regularly employed such devices without a court order to check billing, detect fraud, and prevent violations of law.

[9]Petitioner's reliance (Pet. 15) on *Dennis* v. *United States*, 384 U.S. 855 (1966), thus is unavailing. There, the Court held that where the defendant has shown a "particularized need" for grand jury testimony, "[t]rial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony" *Id.* at 874. Rather, "[t]he trial judge's function * * * is limited to deciding whether a case

seems likely, for example, that an Assistant U.S. Attorney, with his knowledge of the grand jury materials, could isolate particular portions of the transcript warranting petitioner's attention or discuss with petitioner in a general way the nature of the state proceedings so that the Assistant U.S. Attorney could review grand jury evidence for relevant materials. Thus, it does not appear that the burden on petitioner will be substantial.

Petitioner's contention (Pet. 15-16) that the district court's order is "burdensome" rests solely on the possibility that the federal district court might reject his recommendation that certain materials be disclosed. But this concern is wholly speculative at the present time, for petitioner has offered no basis from which it may be inferred that the district court will disagree with petitioner's recommendation. Indeed, the Court's decision in *Douglas Oil* would appear to *require* the district court to give substantial weight to petitioner's recommendation, because petitioner will be better informed about the need for disclosure than the district court. In any event, it is not apparent how the possibility that the federal court might disagree with petitioner's recommendation, even assuming this possibility were to come to pass, would retroactively convert a procedure that was not burdensome into one that was. The burden involved would be no different from that which a state judge might bear when, after a thorough review of the materials, the judge *himself* denies a *Brady* motion; nor is it any different from the burden a federal magistrate bears when he conducts an inquiry prior to making a recommendation that ultimately is rejected by the district court. In

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has been made for production, and to supervise the process * * *." *Id.* at 875. In the instant case, however, the district court was in no position to make the threshold determination whether Neagle had shown the requisite "particularized need" for production without the input of the state trial judge. See *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 228-229.

none of these situations is the process of review rendered meaningless merely because the defendant's motion ultimately is denied.

2. Because the district court's order was authorized by the All Writs Act (and because petitioner does not contend otherwise), the only remaining question is whether the order constituted an abuse of the discretion that petitioner concedes (Pet. 14) is vested in the district courts to fashion an appropriate response to requests for disclosure under Rule 6(e). In our view, it did not.

a. The principal basis for petitioner's argument that the district court abused its discretion is, again, the possibility that the district court might reject his recommendation about what evidence if any in the grand jury materials should be disclosed to Neagle. See Pet. 14-15, 16-17. In petitioner's view, such an eventuality would require him either to preside over a trial in which he did not believe the defendant was afforded the fairness he was due or to dismiss the prosecution. Pet. 16-17. But, as explained above (see page 10, *supra*), this concern is wholly speculative at the present time, for there is no indication that the district court will not defer to petitioner's judgment about the need for disclosure, especially now that the federal grand jury investigation has been completed and the need to maintain grand jury secrecy is materially diminished. The district court's expressed willingness to consult directly with petitioner at any time—which the court of appeals construed as indicating the district court's willingness to remain available (apparently even during the state trial) even if it initially rejects a recommendation for disclosure (Pet. App. D 12-13, 17 n.13)—will ensure a full opportunity for petitioner to present his views.

Moreover, even if the district court did not order disclosure to the full extent recommended by petitioner, this would not necessarily place petitioner in the untenable position he suggests. As an initial matter, it is possible that

Neagle would seek federal appellate review of the district court's refusal to grant the more complete disclosure under Rule 6(e) recommended by petitioner. If such a challenge were successful, it conceivably could result in a new trial under state law, if the trial had been allowed to proceed. Neagle might also have remedies under state law if the federal grand jury materials were not made available. The potential availability to Neagle of such remedies might persuade petitioner that proceeding with the trial would not be an unacceptable course.

In addition, not every area of disagreement between petitioner and the district court, if any develops, must inevitably lead petitioner to believe that the state prosecution would be so fundamentally unfair that he would feel compelled to dismiss the indictment rather than proceed to trial. Indeed, in many respects, his status would be no different from that of a trial judge whose decision granting a criminal defendant's motion to dismiss an indictment or suppress evidence was overturned on appeal prior to trial and who, as a result, thereafter presided at a trial that did not proceed in the manner he believed just and proper. But if petitioner nevertheless believed that he could not personally preside at the trial because of limitations on the evidence available to Neagle, he could disqualify himself and allow another judge to preside, rather than dismiss the indictment. Thus, there simply is no basis on the present record for concluding that the decision below will place petitioner in an unacceptable position.

b. As the court of appeals held, the district court's order is also consistent with the decision in *Douglas Oil*, which requires a coordinated response by the federal judge who supervised the grand jury and the judge presiding over the proceedings for which disclosure of grand jury materials is sought. Petitioner now appears to suggest (Pet. 21) that the district court in this case might have delegated to the state

court the final disclosure determination under Rule 6(e). But petitioner did not urge this solution in the court of appeals (see Pet. App. D 8-9, 13 n.8), and he concedes (Pet. 20) that there are no judicial decisions supporting the authority of a state court to order disclosure of federal grand jury materials under Rule 6(e). Indeed, as the court of appeals observed (Pet. App. D 11), the Federal Rules of Criminal Procedure would appear to confine this authority to the federal courts. See, *e.g.*, Fed. R. Crim. P. 1, 54(a) and (c); cf. *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 224-225.[10] At the very least, given the uncertainties regarding the authority of a state court to pass on a Rule 6(e) motion, the district court did not act unreasonably or with an abuse of discretion in declining to provide for petitioner to make the final disclosure determination. Instead, the district court's order ensures a procedure most closely resembling a delegation to the state court, by providing for full consulation with the state court.

For similar reasons, there is no merit to petitioner's remaining contention (Pet. 15, 17, 18) that the manner in which the district court chose to proceed impermissibly intruded the federal court into state court proceedings. The involvement of the federal district court was compelled by the fact that the defendant in the state criminal proceedings sought disclosure of materials that were in the custody and control of the federal court and were subject to a Federal Rule of Criminal Procedure manifesting a paramount federal policy of ensuring the confidentiality of those materials

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[10]We do not mean to suggest that there would necessarily be an impermissible delegation of the federal court's powers and duties under Rule 6(e) if the court ordered disclosure to a state court judge and specified the conditions under which the latter could make further disclosure of the materials. But the present posture of this case does not make it a suitable vehicle to consider that question.

where appropriate. Thus, as the court of appeals held (Pet. App. D 19-23), this is not a case, such as *Younger* v. *Harris, supra*, and its progeny, in which a federal court has undertaken to decide a question that may properly and more appropriately be left entirely for resolution in state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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